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RECORD, CASE No. 13,530.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 347.

THE BENSON MINING AND SMELTING COMPANY, APPELLANT,

vs.

THE ALTA MINING AND SMELTING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED APRIL 3, 1889.

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a In the Supreme Court of the Territory of Arizona.

ALTA MINING & SMELTING CO., Plaintiff and Respondent,
vs.
BENSON MINING & SMELTING CO., Defendant and Appellant.

Haynes & Stiles and J. A. Anderson, counsel for resp't; Earll, Campbell & Stephens, counsel for appel't.

Transcript on Appeal.

Filed February 3d, 1887.

E. B. DODGE, *Clerk.*

1 District Court, First Judicial District of the Territory of Arizona in and for the County of Pima.

ALTA SILVER MINING COMPANY, Plaintiff,
vs.
THE BENSON MINING AND SMELTING COMPANY, Defendant. } Complaint.

The above-named plaintiff complains of the above-named defendant and alleges—

1.

That plaintiff at the times hereinafter mentioned and ever since was and is a corporation created by and under the laws of the State of New York for the purpose of doing a mining business in the county of Pima, Territory of Arizona, and that the plaintiff duly filed certified copies of its articles of incorporation with the secretary of the Territory of Arizona and with the recorder of Pima county and duly appointed agents, resident in Pima county, Arizona, to represent plaintiff, and upon whom process could be served as required by law.

2.

That defendant, The Benson Mining and Smelting Company, at the times hereinafter mentioned and ever since was and is a corporation created by and under the general laws of the Territory of Arizona.

3.

That on and previous to the first of August, 1883, plaintiff
2 was and now is the owner of and entitled to the possession of the Alta mine, situated in the Harshaw mining district, in Pima county, Territory of Arizona.

4.

That between the 2nd day of September, 1883, and the 28th day of November, 1883, plaintiff was the owner of one hundred and sixty-three tons of silver-bearing ore, extracted from its said Alta

mine, of the value of sixteen thousand three hundred dollars, and was entitled to the immediate possession of the same.

5.

That between the said 2nd day of September, 1883, and the 28th day of November, 1883, at Benson, in Cochise county, Territory of Arizona, the defendant then being in possession of said one hundred and sixty-three tons of silver ore, the property of plaintiff, unlawfully converted and disposed of same to its own use, to the damage of the plaintiff twenty thousand dollars.

6.

That for a further and separate cause of action plaintiff complains and alleges that on or about the 25th day of November, 1883, the defendant unlawfully and with force broke and entered upon a certain mine belonging to plaintiff, to wit, the Alta mine, situated in the Harshaw mining district, in Pima county, Territory of Arizona, for which a patent from the United States is recorded in the office of the recorder of Pima county, in Book 17 of Deeds *to* Real Estate, pages 213 to 221, inclusive, and then and there detached and removed from said mine certain hoisting works, consisting of a steam-engine and hoisting fixtures then and there affixed to and a part of
3 said mine and the property of plaintiff, of the value of two thousand dollars, and then and there detached and removed from said mine a certain pump then and there affixed to and a part of said mine and the property of plaintiff, of the value of five hundred dollars, and converted and disposed of said hoisting works and pump to defendant's own use, to plaintiff's damage in the sum of three thousand dollars.

7.

That for a further and separate cause of action plaintiff complains and alleges that on the 13th of August, 1883, and on divers other days between that day and the first day of December, 1883, the defendant, together with one J. M. Luttrell and one H. H. Scott, unlawfully and with force took and entered the shafts, tunnels, and other workings of a certain mine belonging to plaintiff, to wit, the Alta mine, situated in the Harshaw mining district, in Pima county, Territory of Arizona, for which a patent from the United States is recorded in the office of the recorder of Pima county, in Book 17 of Deeds of Real Estate, pages 213 to 221, inclusive, and then and there unlawfully and wrongfully dug, blasted, excavated, and worked said mine in the lodes, veins, shafts, tunnels, and other workings of said mine in an unskilful and unworkmanlike manner and contrary to the rules of mining, and thereby greatly injured and damaged said mine and the lodes, veins, shafts, tunnels, and other workings thereof, to plaintiff's damage twenty-five thousand dollars.

Wherefore plaintiff demands judgment against defendant for the sum of $48,000 and costs and lawful percentage.

HAYNES & STILES AND J. A. ANDERSON,
Attorneys for Plaintiff.

Filed July 25, 1884.

4 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

ALTA MINING AND SMELTING COMPANY OF ARIZONA, Plaintiff,
vs.
THE BENSON MINING AND SMELTING COMPANY, Defendant.
} Amended Complaint.

The above-named plaintiff, by leave of the court first had, files this its amended complaint and complains of the above-named defendant and alleges:

1.

That plaintiff at the times hereinafter mentioned and ever since — and is a corporation created by and under the laws of the State of New York for the purpose of doing a mining business in the county of Pima, Territory of Arizona, and that the plaintiff duly filed certified copies of its articles of incorporation with the secretary of the Territory of Arizona and with the recorder of Pima county, and duly appointed agents, resident in Pima county, Arizona, to represent plaintiff, and upon whom process could be served, as required by law.

2.

That defendant, The Benson Mining and Smelting Compan*t*, at the times hereinafter mentioned and ever since was and is a corporation created by and under the laws of the State of California.

3.

That on and previous to the first of June, 1883, and at all times hereinafter mentioned plaintiff was the owner of and
5 entitled to the possession of the Alta mine, situated in the Harshaw mining district, in Pima county, Territory of Arizona.

4

That between the said first day of June, 1883, and the first day of December, 1883, plaintiff was the owner of two hundred and ten (210) tons silver-bearing ore, excavated from its said Alta mine, of the value of twenty-one thousand dollars, and was entitled to the immediate possession of same.

5.

That between the said first day of June, 1883, and the first day of December, 1883, at Benson, in Cochise county, Territory of Arizona, the defendant, then being in possession of said two hundred and ten tons of silver-bearing ore, the property of plaintiff, unlawfully converted and disposed of same to its own use, to the damage of plaintiff twenty-five thousand dollars.

Wherefore plaintiff demands judgment against defendant for the

sum of twenty-five thousand dollars and costs and lawful percentage.

HAYNES & STILES AND J. A. ANDERSON,
Attorneys for Plaintiff.

Endorsed: Filed Feb. 7, 1885. C. S. Jeffords, cl'k, by J. A. Anderson, Jr., dep.

6 (Title of the Court and Cause.)

Answer.

Now comes the above-named defendant and, answering the plaintiff's amended complaint herein:

1.

Denies that on or previous to the first of June, 1883, or at any of the times mentioned in said complaint, the plaintiff was the owner or entitled to the possession of the Alta mine mentioned in said complaint.

2.

Denies that between the first day of June, 1883, and the first of December, 1883, or at any other time, the plaintiff was the owner of two hundred and ten tons or any silver-bearing ore excavated from said Alta mine, of the value of twenty-one thousand dollars or of any value whatever; and defendant denies that there was ever excavated from said Alta mine more than 176 tons or any ore excavated therefrom, of the value of more than $352.00 *dollars;* and defendant denies that there were more than 176 tons of the ore referred to in said complaint, or that the value thereof exceeded $352.00 *dollars;* and denies that the plaintiff at the time alleged in said complaint was the owner or at any time entitled to the possession of the same or any part thereof.

3.

Denies that between the said first day of June, 1883, and the first day of December, 1883, or any other time, at said Benson or at any other place, the defendant was in possession of said ore or any part thereof, and denies that the same or and part thereof was the property of plaintiff; and denies that the defendant unlawfully or otherwise or in any manner converted or disposed of the same
7 or any part thereof to its own use or at all; and denies that by any act of the defendant in or about the premises or relative to said ore the plaintiff sustained twenty-five thousand dollars or any damage whatever.

4.

And — another further and separate defense to said complaint defendant alleges that on the said 1st day of June, 1883, and for over six months prior thereto and until the 28th day of August, 1883, one J. M. Luttrell was in the actual, exclusive possession of the said

Alta mine under a claim of ownership by reason of having lawfully located the same under the laws of the United States; that on or about the last above-mentioned date one H. H. Scott purchased an interest in said mine from the said J. M. Luttrell, and thereafter and until on or about the — day of 1884 the said J. M. Luttrell and H. H. Scott were in the actual possession of said mine and during said time the said Luttrell and Scott excavated from said mine all the ore that was excavated therefrom, which did not exceed 176 tons.

Defendant further alleges that the only ore ever in the possession of this defendant which had been excavated from the said Alta mine was 18.81 tons delivered to this defendant by the said Luttrell and Scott while they were respectively in possession of said mine as aforesaid, and that the same was so delivered to this defendant for the purpose of reduction, and the same was by the defendant reduced into bullion and the proceeds thereof, less the costs and charges for reduction, returned to the said Luttrell and Scott respectively; and the defendant alleges that the proceeds of said ore *was* insufficient to pay the expense of excavation and the transportation thereof to the defendant's smelting works at Benson and the costs
8 and charges of reducing the same, and that said ore, before its excavation from the mine and transfer to defendant's smelting works, was of no value whatever.

Wherefore defendant demands judgment against the plaintiff that the complaint be dismissed, and for costs of suit, including the percentage allowed by law.

EARLL, CAMPBELL & STEPHENS,
Attorneys for Defendant.

Endorsed: Filed April 7, 1885. C. S. Jeffords, clerk, by J. A. Anderson, Jr., dep.

9 (Title of the Court and Cause.)

Judgment.

This cause having been regularly called for trial before the court (a jury trial having been expressly waived by the parties in open court), Messrs. Haynes & Stiles and J. A. Anderson appearing for the plaintiff and Messrs. Earll, Campbell & Stevens appearing for the defendant, and the court — heard the proofs of the respective parties and considered the same, and the eviden-e being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that The Alta Silver Mining Company, the plaintiff, do have and recover of and from The Benson Mining and Smelting Company, defendant, the sum of $3,730.82, damages, with interest thereon, at the rate of ten per cent. per annum, from the 1st of December, 1883, amounting to $869.24, making together the sum of $4,590.06, with interest thereon from the date of this judgment

until paid at the rate of ten per cent. per annum, and plaintiff's lawful percentage thereon, amounting to $121.82, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $57.20, and that plaintiff have execution therefor.

Judgment rendered this 22nd day of March, 1886.

WM. H. BARNES,
Judge 1st District Court.

Endorsed: Filed March 29th, 1886. J. H. Martin, clerk.

10 (Title of the Court and Cause.)

Notice of Intention to Move for a New Trial.

To the clerk of this court, said plaintiff and his attorneys, J. A. Anderson, Esq., and Messrs. Haynes and Stiles:

You and each of you will take notice that the above-named defendant intends to and will move the above-entitled court to vacate and set aside the decision made, rendered, and entered in the above-entitled cause by said court against said defendant and in favor of said plaintiff on the 22nd day of March, A. D. 1886, and grant the defendant a new trial therein for and upon the following causes and grounds of error materially affecting the substantial rights of t-e defendant in said action, to wit:

1st. Newly discovered evidence material for the defendant it could not with diligence have discovered and produced at the trial of this cause.

2nd. Insufficiency of the evidence to justify the said decision, and that it is against law.

3rd. Error in law occurring at the said trial and excepted to by the defendant.

Said motion will be made upon affidavits to be filed herein and upon a statement of the case and upon the pleadings, deposition, and documentary evidence on file and the minutes of the court herein.

Very respectfully,

EARLL, CAMPBELL & STEPHENS,
Defendant's Attorneys.

Endorsed: Filed April 7th, 1886. J. H. Martin.

11 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

THE ALTA MINING AND SMELTING CO., Plaintiff, *vs.* THE BENSON MINING & SMELTING CO. } Statement on Motion for New Trial.

This cause came on regularly for trial in the above-named court on the 18th day of March, 1886, Messrs. J. A. Anderson, Haynes and Stiles appearing as counsel for the plaintiff, and Messrs. Alex. Campbell and C. C. Stevens appearing as counsel for the defendant. A jury was expressly waived by both parties in open court, and the

court proceeded to try said cause, sitting without a jury; whereupon the following proceedings were had and testimony given:

The plaintiff, to maintain the issue on its part, introduced and read the following depositions:

The deposition of J. M. Luttrell, which is hereto annexed and made a part hereof.

John S. Wood testified on behalf of the plaintiff that during the year 1883 he was the duly appointed resident agent of said corporation plaintiff in said county for the service only, and on cross-examination that he knew of the entry and relocation and the working of the Alta mine by Luttrell and Scott and of the shipment of the ores to Benson, and that he did not, nor did the plaintiff, to his knowledge, make any protest or objection thereto to Luttrell and Scott or notify them or either of them or any one else of the same or order them to cease or redeliver the possession of the Alta mine to the plaintiff.

12 I. It was matter of common knowledge that the Alta Mine Company owned the mine and had in previous years worked it extensively. I was one of the stockholders.

II. The plaintiff read the deposition- of W. M. Roberts, James Finley, C. C. Watkins, John Rusher, and J. M. ——, which depositions were taken under the original complaint before the amended complaint was filed, it being agreed that only such parts thereof should be considered by the court as were applicable to the issues ra-sed by the annexed complaint and answer.

The original complaint is considered as forming a part of this statement, and depositions are hereto annexed and made a part hereof.

13 (Title of Court and Cause.)

Pursuant to enclosed notice to take depositions in the above case, the parties, by the-r attorneys, J. A. Anderson for plaintiff and Alexander Campbell for defendant, met on the morning of February 2nd, 1886, at the office of —— Baldwin, in the town of Harshaw, Pima county, Arizona, and proceeded to take the depositions of W. Hooper, named therein, on behalf of plaintiff; and W. M. ROBERTS, the first witness, being duly sworn, deposes as follows:

Question 1st. By plaintiff:

Q. Witness will state his name, age, residence, and occupation.

A. W. M. Roberts; thirty-three years of age; residence, Washington camp, Pima Co., A. T.; miner by occupation.

Q. Were you employed to work on the Alta mine, near Harshaw, in the year 1883? And, if so, state in what capacity and at what time, and how long were you employed.

A. I was employed on the mine to work on the said mine *on* the last of November, 1883, and in December of the same year.

Q. Were you at work on said mine when work was stopped on it in December?

A. I was.

Q. How long were you at work on it?

A. About twenty-three days.

Q. By whom were you employed to work on said mine?

A. By Mr. Cooley, the foreman.

Q. State, as near as you can, how the hoisting wor-s were placed in said mine, and how attached.

A. They were placed over the perpendicular shaft; there was a small engine and gallows frame; they were set on the top of the ground without any mason work and without being fastened to the gr-und, so *so* far as I saw.

14 Q. Was the pump attached to or fastened to the ground in any way?

A. No, sir.

Q. How long before they stopped working on the mine in December did you stop working it?

A. I don't know exactly; not very long, though. I was on the mine next morning after they stopped working.

Q. What was the condition of the mine while you — working in it? And state if you know it was during said time worked in a skilful and workmanlike manner.

(Second part of the question objected to as leading.)

A. It was in a bad condition.

(Latter part of question withdrawn.)

Q. State, as near as you can, the manner in which said mine was worked while you were employed on it.

A. They gouged around in every place in which they could find ore; the orders from the for-man was not to work anywhere except where there was ore; that ore was what they wanted.

(Objected to on the ground as hearsay, so far as orders of the foreman was concerned.)

Q. State whether the mine was timbered or not as the work progressed in the usual and customary manner.

(Question objected to as leading.)

A. It was only timbered sufficiently to answer temporary purposes.

Q. What disposition was made with -he waste rock?

—. Some of it was taken out and some of it was stowed behind the timbers.

Q. Were you sufficiently acquainted with the character of the mine during the time you were at work on it *and* sta-e the assay thereof? And, if so, state it as near as you can.

A. I was sufficiently acquainted with the assay value and have had it worked. I had some of it assayed in 1880 and some of it in November, 1884, and it would average, taking the whole, by from $180 to $185. There was no low grade ore in the mine.

Q. State what the ore yielded on the average that you had

worked, and whether it was of the same character of ore that
15 was mined during the term that you were working in the mine in 1883.

A. I cannot say exactly; it was of the same character of ore as that mined in 1883.

Q. How did the working result, compared with the assay value?

A. It did not run as high as some of the assay value.

Q. How much below did it fall, or on an average, as near as you can recollect?

A. I do not know how much it did fall below.

Cross-examination:

Q. What was the condition of the mine when you commenced working there in 1884?

A. The mine was in bad condition.

Q. How did you select the ore which you had worked in November, 1884?

A. I took it out and sacked it in the mine.

Q. How much of the ore did you have worked in 1884, and where did you have it worked?

A. I had it worked at the Benson smelter; I don't know the exact amount; I think about 100 pounds.

Q. Did you have it worked before or after you were employed in the mine?

A. Afterwards.

Q. By whose, if by any person's, directions?

A. I was offered a lease of the mine by Mr. Horton, and took it upon trial, and took out that ore during the time I was trying it.

Q. Do you know whether the ore which you took out when trying the mine — richer or poorer than that which was taken out when you were employed by the foreman?

A. I think it was poorer; all the best had been taken out, I think.

Q. Did you take the lease?

A. No, sir.

And further this deponent saith not.

W. M. ROBERTS.

Duly read, corrected, and sworn to.

16 JAMES FINLEY was next called and sworn and testified as follows:

By PLAINTIFF:

Q. State your name, age, occupation, and residence.

A. James Finley; forty years; miner; Harshaw.

Q. Were you employed in any capacity, at what time, and how long were you so employed?

A. I was employed some time in the year 1883 as superintendent of said mine; I was employed for something over a month.

Q. By whom were you employed?

A. By Mr. H. H. Scott.

Q. What relation, if any, does Mr. H. H. Scott bear to Mr. Salisbury, the president of the Benson Mining and Smelting Company?

A. I do not know.

Q. Do you know how much ore was sent from the Alta mine during the time Scott and Luttrell were working it to the Benson Mining and Smelting Company?

A. I do not.

Q. During the time that you were foreman at said mine how were the employés paid?

A. By checks on Mr. Salisbury.

Q. What relation does Mr. Salisbury bear to the Benson Mining and Smelting Company?

A. I do not know.

And further this deponent saith not.

JAMES FINLEY.

Duly read, corrected, and sworn to.

17 C. C. WATKINS was next called and sworn and testified as follows:

By PLAINTIFF:

Q. State your name, age, occupation, and residence.

A. C. C. Watkins; forty years; a miner; Crittenden.

Q. If during the year 1883 you were employed in and about the Alta mine, near Harshaw, state in what capacity, by whom employed, and how long you were so employed.

A. I was foreman under Scott and Luttrell just preceding Finley's employment as such; I think between two or three months, but I don't recollect exactly. The time I mentioned includes the time I was foreman under Scott as well as when I was foreman under Scott and Luttrell.

Q. During the time you were foreman under Scott and Luttrell how was the mine worked?

A. It was not worked in a workmanlike manner to keep the mine in good condition.

Q. State, as near as you can, in what respect.

A. In leaving all the waste and dead work in the mine and only taking out the ore, and therefore leaving the mine in bad condition for after work, and in not timbering the mine as much as it ought to be timbered.

Q. During the time you were working as foreman of the mine did you see Mr. Salisbury, the president of the Benson Mining and Smelting Company, at the mine?

A. Yes, sir.

Q. By whom was he accompanied?

A. By Mr. Scott and Mr. James Day.

Q. About what time was Salisbury at the mine?

A. I don't recollect.

Cross-examination:

Q. Was all the waste left in the mine?

A. It was at that time.

18 Q. Was any of it removed afterwards? When & by whom?

A. Yes, sir; some was removed after they got the machinery working.

Q. What proportion was removed?

A. All was removed from the lower stopes and very little from the upper stopes.

Q. The pay streak varied?

A. Sometimes it was 18 inches and sometimes an inch.

Q. From how many of the stopes was the ore removed and in how many was it left?

A. It was removed from all of the lower stopes; a little was removed from one of the upper stopes.

Q. In working the mine did you follow the pay ore?

A. Yes, sir; all we could.

C. C. WATKINS.

Duly read and corrected and sworn to.

19 JOHN RUSHER, called and sworn, testified as follows:

By PLAINTIFF:

Q. State your name, age, occupation, and residence.

A. John Rusher; fifty-seven; teamster; Harshaw.

Q. If, during the year 1883, you hauled any ore from the Alta mine to Crittenden for shipment to the Benson Mining and Smelting Company, state as near as you can when you first commenced hauling it and state how much you hauled in all.

A. I first commenced hauling in June—the exact time I do not know. I am confident that I hauled in all about forty-two hundred and fifty sacks.

Q. How much would the sacks average in weight?

A. They were calculated to average 100 pounds.

Q. Would they average that weight?

A. I think they would.

Q. Of the amount of the forty-two hundred and fifty sacks how many sacks were hauled during the time Scott and Luttrell were working the mine?

A. Thirty-four hundred and thirty-six; about that; that much, at any rate.

Q. Who was working it when the balance was hauled?

A. J. M. Luttrell.

Cross-examination:

Q. When you delivered the ore at the depot was it weighed there?

A. No, sir.

Q. Do you know whether it was ever weighed; and, if so, where?

A. I do not know, but I got the weights from the Benson smelter, on which weights I got my pay.

Q. Do you know the exact weight of the ore delivered at the smelter?

A. I have no knowledge now.

JOHN RUSHER.

20 JAMES LEWIS was next called an- sworn and testified as follows:

By PLAINTIFF:

Q. State your name, age, and occupation.

A. James M. Lewis; fifty-one; butcher; formerly miner.

Q. Were you employed as a miner to work on the Alta mine, near Harshaw, during the year 1883? If so, how long were you so employed and at what time?

A. I was so employed. I worked nine days in the latter part of September. I was employed by J. M. Luttrell. I worked some time in the first part of November.

Q. State how the mine was worked during the time you were so employed.

A. I worked on the 74-foot level. I cleared that drift out. Then they took me out of the drift and put me into another shaft to timber it and line it so a bucket would run up and down the shaft. After I got done with that timbering I cleaned the crown level and cross-cut of the shaft. I believe I was one of the first men that was down that shaft at that time.

J. M. LEWIS.

Duly read and corrected and sworn to.

We agree that the foregoing may be used as evidence in the case of The Alta Silver Mining Company *vs.* The Benson Mining and Smelting Company, now pending in the district court of Pima county, as evidence for plaintiff or defendant, waiving all exceptions as to formalities, reserving all exceptions as to relevancy and competency, this 2nd day of February, 1886.

J. A. ANDERSON, *Attorney for Plaintiff.*
EARLL, CAMPBELL & STEPHENS,
Defendant's Attorneys.

21 Plaintiff also showed entry and payment in the proper United States land office of the Alta mine Sept. 10th, 1878, for patent by the locators of the mine and the grantors of the plaintiff and showed quitclaim conveyance of the mine to the plaintiff, and that patent issued Jan'y 10th, 1884, for patent to the locators and applicants, William Keegan, A. T. Harshaw, and M. Fagen.

The defendant produced and the plaintiff introduced a certain instrument in writing executed between J. M. Luttrell and H. H. Scott, as follows:

Memorandum of agreement, made this 28th day of August, 1883, between J. M. Luttrell, of Pima county, Territory of Arizona, party of the first part, and H. H. Scott, of same Territory, party of the second part.

The party of the first part has this day made, executed, and delivered unto the party of the second part a good and sufficient deed for an undivided one-half interest in and to the Ben. Butler mining claim, situate and being in Harshaw mining district, Pima county, Arizona—

To be placed on record at any time within six months from date hereof that the party *to* the second — may elect; otherwise said deed shall be returned to the party of the first part.

For and in consideration of the above and the covenants to follow, the party of the second part agrees to furnish a steam-hoisting work and pump, the freighting and erecting of said machinery, and all other fixtures and articles necessary to place the above machinery in working condition, and all other expenses in the working of said mines, in the extracting of, shipping, and smelting of the ores of said mines, shall be borne and paid for from the proceeds of the ore so extracted.

And it is further agreed that the party of the second part may at any time during the above-mentioned six months remove all of said machinery upon the return to the party of the first — the above-mentioned deed; but if the party of the second part should elect to become half owner in said mines and place upon record the said deed, then the above-described machinery shall be the property of said mines.

The party of the first *that* agrees to remain in charge of the mine without compensation during the pleasure of the party of the second —, and to relinquish said control and management *to* any time and to any one that the party of the second part may desire to place in charge of said mines.

And it is further agreed that all the ores that may be extracted from said mines shall be shipped to and smelted by the Benson Smelting and Refining Company, and that the said smelting company is authorized by these presents to pay to the party of the second part all moneys that — may have advanced for the putting up of said above-mentioned machinery, the working of said mines, and all other moneys that he may have advanced in carrying out any of the provisions of the above agreement from the proceeds of the ores of said mines, after deducting the smelting and other charges, and the balance of money remaining after the above deductions shall be divided, share and share all alike, between the parties of the first and second part.

In witness whereof said parties have hereunto set their hands and seal- the day and year — written.

Duly signed.

23 (Title of Court and Cause.)

The deposition of J. M. Luttrell, a witness introduced on behalf of plaintiff, taken by consent in San Francisco, California, to be now used in evidence on the trial of the above-entitled action, subject to all exceptions as to competency and relevancy, formalities in the taking waived this 7th day of December, 1885.

J. A. Anderson, attorney for plaintiff; Earll, Campbell & Stephens, for defendant.

By PLAINTIFF:

Q. Give your name, age, residence, and occupation.

A. J. M. Luttrell; 48 years; residence, Oakland, California, 13th and Center street-, near the corner.

Q. Where were you residing in 1883?

A. In Kanoria, Pima Co., Arizona.

Q. Were you acquainted with the Alta mine, situated near Harshaw, in said county?

A. Yes, sir.

Q. How long have you known it?

A. Since 1879.

Q. Who owned it at that time?

A. Fagen, Harshaw, and some others whose names I do not recollect.

Q. Did you know the time the mine was sold to plaintiff?

A. Yes, sir; Fagen and Judge Wood told me about the sale.

Q. Did you ever hear anything said as to the mine having been entered and application for patent made for it? If so, state when you first heard of it and who told you.

A. Yes, sir; I heard of it in 1880. Fagen and Luttrell both told me. They said they had paid $800 to — the matter, but did not know what had been done about it.

Q. Were you the party who located said mine under the name of "Ben. Butler" in 1883?

A. Yes, sir.

24 Q. Did you take out any ore from said mine; if so, when?

A. It was either in the latter part of May or first of June, 1883, that I took out the first ore.

Q. Do you know Mr. Salisbury, the president of the Benson Mining and Smelting Company?

A. ——.

Q. Did you know of any steps being taken in the fall of 1883 by any one to prevent the patent to the Alta mine being issued by the Government? If so, state what you know about it.

A. When I was in Tombstone, in October, 1883, to have my broken foot set I met Mr. Salisbury and Mr. Scott there, and they told me that they had telegraphed on there. I do not know how much they said it cost, but I think the attorney's name was Clayton. They said we would have to prove that neither Harshaw or Fagen or the other man—I do not recollect his name—were citi-

zens, or that the paper it was published in was not the — to the mine, or else they would get the patent.

Q. Did you work the mine in connection with any one else; if so, whom?

A. I worked it with Scott. He signed the papers, he (Scott) or Salisbury, and Salisbury sent for Scott to sign them.

Q. When was the ore sent to be smelted?

A. It was put in the articles that the Benson Smelting Company was to get it at 85 cents per ounce.

Q. How — you to locate the mine in 1883?

A. Because I saw that there was not sufficient work done on it.

Q. Work done by whom, do you mean?

A. Johnny Groff; he was the man employed to work on the mine, to do the assessment work.

Q. Was he employed to work on the mine by plaintiff in 1883?

A. He was employed by the Alta Mining Company.

Q. Did plaintiff have any one in charge of the mine in 1882; and, if so, whom?

A. Yes, sir; I think it was A. Baldwin. He lives in Harshaw and is a justice of the peace.

25 Q. To whom did the hoisting works on the mine belong to that were on the mine while you were working it?

A. They came to Crittenden consigned to Mr. Salisbury; I received them. The hoisting works came from the Flux mine.

Q. When were they taken off the mine and why were they taken off?

A. They were taken off at night. I got a despatch and took it to Mr. Day. The dispatch directed the hoisting works to be taken off at that night. It was signed Henning.

Cross-examination:

Q. At what date did you relocate the mine?

A. January 1st, 1883.

Q. Did you then believe that you had a right to relocate it; and, if so, for what reason?

A. Yes; I believed I had for want of assessment work for 1882.

Q. How much assessment work was done in 1882 and what was its worth?

A. I always look at it that I could do it in three or four days. It was not worth more than $25.00. I don't think it was worth that.

Q. How long before you relocated it that the mine had been worked?

A. Some time in 1881, I think.

Q. At what time when Fagen and J. K. Luttrell made the statement referred to by you in your direct examination was the Alta Mining Company incorporated or in existence?

A. I think it was not. I don't know what time it was incorporated. It was in 1879 or '81 that they told me that.

Q. Had either Scott or Salisbury anything to do with the relocation?

A. No, sir.

Q. When you first commenced taking out ore from the mine had either Scott or Salisbury any business connection with you?

A. No, sir.

Q. Can you recollect the date when you commenced working the mine under your agreement with Scott?

26 A. I think about the last of August.

Q. How soon after your relocation of the mine did you receive any notice of claim in behalf of the Alta Mining Company to the mine?

A. The first notice I received was from Horton to the effect that he was agent of the Alta mine in the latter part of 1883 or the first part of 1884.

Q. Had you before that been forbidden by any one on behalf of the Alta Mining Company from working the mine?

A. No.

Q. Can you recollect with any certainty the date or about the date of the conversation with Salisbury and Scott at Tombstone?

A. I think it was in October; cannot tell the exact date.

Q. Before you made the arrangement with Scott had you worked the mine on your own account; if so, how long, and where did you have the ore smelted?

A. I worked the mine, not very extensively, for two months and shipped the ore to the Benson smelter.

Q. Did you have an account with the Benson smelter for the ore so shipped?

A. They gave me a statement and paid me what was coming.

Q. During the time did you pay the wages of the men and expenses of the mine or was the money advanced to you for that purpose?

A. I paid it.

Q. After the arrangement with Scott who furnished the money to pay the expenses of mining and transporting the ore?

A. Salisbury, for the Benson Company. That is where it came from. Finley used to draw on him and the material was directed to Finley after he took charge.

Q. How and when did the arrangement between you and Mr. Scott terminate?

A. In December or the latter part of November, 1883. It was terminated by the receipt of the telegram. The hoisting works, engines, tools, lumber, and tanks, etc., were removed that night

27 Q. Who had furnished the hoisting works, tools, lumber, and tanks?

A. Mr. Salisbury; they had been furnished for the purpose of working the mine.

Q. After the close of the business was any account furnished you by the Benson Smelting Company?

A. Yes; Judge Anderson has it.

Q. Look at Defendant'- Exhibit A and state what the cash items there contained and stated to have been paid to you were paid for.

A. $500 was to pay for l-bor on the Ben. Butler or Alta; the $200

was to pay for lumber for the mine; the $200 on October the 5th, he has got it fixed so that I cannot tell exactly what it was for; the balance was for my private account. The $500 is the only time I ever paid the men personally.

Q. Prior to Scott becoming associated with you in the working of the mine can you tell what, if any, was the profit on the ore you shipped from the mine?

A. I cannot; it must have been six or seven hundred dollars.

Q. How did the ore which you then shipped compare in quality with the ore afterwards taken from the mine?

A. I cannot answer.

Re-examination by plaintiff:

Q. Who was Jim Finley appointed superintendent by?

A. By Salisbury and Scott.

Q. While you were working the mine did you ever receive a message from Dave Harshaw, one of the original locators; if so, what was it?

A. It was either Billy Keehan or MacBain told me that Harshaw said they would get a patent in spite of me; it had been applied for. I cannot say whether that was during the time — was working it or when the company was working, because I did not
28 pay any attention to it. I thought they were bluffing me.

Recross-examination:

Q. What, if any, reason did Salisbury or Scott assign for having Finly act as foreman of the mine?

A. I suggested Finley's appointment, saying he was an older miner and understood the mine better than I.

J. M. LUTTRELL.

Duly read, corrected, and sworn to.

29 *Messrs. Scott and Luttrell in Account with Benson Mining and Smelting Company.*

1883.				
Sept.	1.	To cash paid J. M. Luttrell	500	
	6.	" do.	200	
	25.	To freight on one car ore	20	25
	25.	Travelling expenses	35	
	29.	To freight on one car ore	25	31
Oct.	5.	Labor & expenses, J. M. Pickett	104	25
	"	To cash paid J. M. Luttrell	200	
	6.	To freight on one car ore	30	38
	"	To express charges	4	25
	"	To mdse. from Rogers Bros.	5	50
	"	To labor and expenses, I. I. Wilson	62	50
	11.	Checks paid	639	82
	13.	"	738	54
	"	To freight on two cars ore	52	39
	"	To materials from smelter	35	

1883.			
Oct.	18.	To checks paid	254 31
	"	To cash paid J. M. Luttrell	100
	22.	To freight on 4 cars ore	63 62
	23.	To powder	88 65
	25.	To checks paid	165
	"	To cash paid J. M. Luttrell	100
	27.	To freight on 2 cars ore	35 62
	31.	To checks paid	85 85
	"	To freight on 3 cars ore	77
Nov.	5.	To travelling expenses	18
	"	To checks paid	189 03
	7.	To mdse. from Sisson, C. & Co.	33 92
	"	To checks paid	571 50
	"	To "	589 40
	"	" "	12
			$5,037 09

30

1883.		To amount brought forward	$5,037 09
Nov.	9.	Checks paid	914 12
"	"	Travelling expenses	24
"	10.	Cash paid J. M. Luttrell	100
"	"	J. Finley	82 17
"	"	Checks paid	338 50
"	"	Freight on 4 cars	86 09
"	12.	Express charges	4 70
"	"	Checks paid	488 00
"	"	Mdse. from Rogers Bros.	61 50
"	13.	Checks paid	260 50
"	17.	"	6 00
"	22.	Lumber and mdse.	46
"	27.	Freight on three cars ore	56 11
"	"	Checks paid	50
"	24.	Freight	62 25
"	26.	Checks paid	132 45
"	30.	Freight on two cars ore	26 98
"	"	Checks paid	102 50
Dec.	3.	"	942 27
"	4.	"	848 39
	"	Cash to J. M. Luttrell	50
"	"	Merchandise, etc.	15 80
"	10.	Checks paid	150
"	11.	Cash to J. M. Luttrell	25
"	17.	Checks paid	304 97
"	22.	Expenses, J. M. Day	38
"	"	Powder	135 65
"	27.	Cash to J. M. Luttrell	100
1884.			
Jan.	4th.	Checks paid	104 35
			$10,505 22

31

1884.		To amount brought forward		$10,505 22
Jan.	26.	Attorney's fees		25 25
Feb.	1.	Checks paid		9
"	14.	" "		12
March	24.	Merchandise, etc.		4
				$10,555 47

CONTRA CR.

1883.					
Sept.	13.	By ore lots, 249 & 292½	602 91		
"	24.	" " 3316	1,328 22		
"	25.	" " 324 & 325	882 23		
Oct.	12.	" " 341¼	718 22		
"	13.	" " 341	1,245 81		
"	18.	" " 357	158 19		
"	25.	" " 359	337 41		
"	"	" " 371	240 53		
"	"	" " 375	193 79		
"	"	" " 376	150 83		
"	27.	" " 377	202 75		
"	"	" " 383	212 27		
Nov.	2.	" " 389	296 99		
"	"	" " 389½	174 06		
"	"	" " 392	52 30		
"	"	" " 390	207 42		
"	"	" " 395	137 49		
"	"	" " 402	42 55		
"	"	" " 403	267 73		
"	12.	" " 405	126 50		
"	"	" " 406	39 85		
"	17.	" " 414	258 07		
"	21.	" " 418	$7116 02		
			$7,962 14		10,555 47

32

1883.		Amount br-ught forward	$7,962 14		$10,555 47
Nov.	21.	By ore lot, 419	10 42		
"	"	" " 420	35 13		
"	"	" " 421	625 60		
"	"	" " 422	90 80		
"	"	" " 423	87 10		
"	27.	" " 428	358 98		
"	"	Wood sold at Harshaw	54 30		
"	"	Rebate on travelling expenses	65		
Dec.	3.	Ore lot, 428	65 80		
"	"	10 cts. per oz. on 8258 ounces silver	25 80		
"	"	Tools and materials	347 40		
					$10,555 47

33 *Deposition of H. H. Scott, Taken by Stipulation March 4th, 1886, before Geo. F. Knox, Notary Public, San Francisco, California.*

Interrogatories.

1st. What is your name, occupation, place of residence?

2nd. Are you acquainted with a mining claim known as the Ben. Butler mine, situated in the — mining district, county of Pima, Arizona; if so, how long have you known it?

3rd. Did you ever work said mine; and, if so, under what circumstances and with whom?

4th. If you state that you did work the said mine state at what time you commenced working it and under what circumstances you took possession; state this fully and particularly.

5th. Who had been working the mine prior to the time that you had possession, if anybody, and at what time? State fully and particularly.

6th. How long did you continue to operate and work said mine and under what circumstances did you give up possession of it, if at all?

7th. If you state in answer to the previous questions that you were working the said Ben. Butler mine with one J. M. Luttrell state what time you first became associated with Luttrell in said mine and whether any agreement was entered into between yourself and Luttrell in regard to the same.

8th. Was such agreement in writing? And, if you answer yes, state whether you have the agreement; and, if not, where it is or who has it; if you have the agreement produce it and annex it to this deposition as an exhibit.

9th. During the time that Luttrell and yourself worked said mine what ore was taken out of the mine and what was done with
34 said ore, to whom was it shipped for reduction, and what was the quantity and what the value of such ore?

10th. If you state that the ore taken from the mine was sent to the Benson Mi*n*i*n*e and Smelting Company for reduction state also to whom and in what manner the proceeds of said — was paid.

11th. If you state in answer to previous questions that you went in with J. M. Luttrell to work the Ben. Butler mine state whether this agreement was made by you on your own individual account or did you make the agreement on behalf of any other person; and, if so, whom.

12th. Do you know Mr. M. Salisbury, of the Benson Mining and Smelting Co.?

13th. If you answer to the previous questions yes, state whether The Benson Mining & Smelting Co., the defendant, or Mr. Salisbury had any interest, to your knowledge, in the Ben. Butler mine at the time you were working it.

14th. Was any arrangement or agreement made between the Benson Mining and Smelting Co. on the one side and Luttrell and your-

self on the other as to the ore to be obtained from the mine; if there was, what was the agreement? State this fully and particularly.

15th. If you state that the Bensen Mining and Smelting Co. entered into any such arrangement or agreement state fully and particularly what was done by Luttrell and yourself with regard to moneys received by you and ore shipped by you to the Benson Mining and Smelting Company.

16th. During the time that you and Luttrell worked the mine how much labor did you employ in and about the mine and what were your average monthly and weekly expenses? Give this as near as possible and as much in detail as you can with regard to items.

35 17th. At the time you and Luttrell worked the mine were you the owners of the engine hoisting works on the mine; if not, to whom did they belong and how long did you use such machinery and what became of it?

18th. Were you ever notified at any time by any one that you were not entitled to take and mine ore from the Ben. Bttler mine; if so, when and by whom were you notified? State also the residence or residences of the people who notified you and what, if any, acquaintance you had with them or either of them and the length of time you were acquainted.

19th. Did you and Luttrell or either of you continue to work said mine (Ben. Butler) after receiving such notice and what did you do at such time?

20th. At the time you took possession of the mine what was the condition with regard to machinery and appurtenances for working the same?

We waive cross-examination.

J. S. ANDERSON.
HAYNES & STILES.

36 *Deposition of H. H. Scott.*

H. H. SCOTT, a resident of the city and county of San Francisco, above the age of 21 years, being by me duly sworn and examined on the part of the defendant, doth depose and say as follows:

Interrogatories propounded by E. B. YOUNG, Esq.:

To the first interrogatory the witness saith: My name is H. H. Scott. I reside in San Francisco. I am deputy collector of customs in said city.

To the second interrogatory he saith: I know a mine called Ben. Butler or Alta mine, situate in Harshaw mining district, Territory of Arizona. I have known said mine since some time in the year 1883.

To the third interrogatory he saith: I did work said mine in partnership with J. M. Luttrell. I commenced working said mine with J. M. Luttrell some time in 1883. Luttrell had been working said mine before I went in with him, having taken it up under

location notices. When I went in with J. M. Luttrell I presumed, he had a proper right to work the mine.

To the fourth interrogatory he saith: I commenced working the mine some time in the summer of 1883 upon an agreement with Luttrell. I assumed all the obligations that might accrue on the mine and for that consideration he was to deed me a certain portion of the mine, and I was to have the management of the mine. The shaft was in no condition to work in the lower levels. At considerable expense—from one thousand to two thousand doll-rs, I cannot tell the exact amount—we cleaned out the shaft, timbered it, and re-
timbered it. I think above the seventy-foot level the mine
37 was dry, but in every poor condition for mining. There was no appliances or machinery on the mine for properly working it.

To the fifth interrogatory he saith: J. M. Luttrell had been working the mine before I took possession. The time he had been working it I don't remember; I think, though, from January, 1883.

To the sixth interrogatory he saith: I worked the mine four or five months. I gave up possession of the mine after becoming satisfied that the title of the mine was in the Alta or Ben. Butler people. There was no work done on the mine by me after I gave up possession of it.

To the seventh interrogatory he saith: I became associated with J. M. Luttrell in working this mine some time in the summer of 1883, I believe. I made an agreement with J. M. Luttrell in writing, but I have not got a copy of the agreement with me. I do not know where the agreement is now.

To the eighth interrogatory he saith: The agreement was in writing, as I have before stated, a-d I have not got a copy of it. The last I know of it it was left in the office of the Benson Mining and Smelting Company. I don't remember the exact terms of the agreement.

To the ninth interrogatory he saith: I cannot tell the exact amount of ore taken out, but it was all shipped to the Benson Mining and Smelting Company for reduction. I could not even approximate the quantity. The ore varied materially in quality, some of the ore going as low as 30 to 40 ounces of silver a ton, and other portions of it higher. The ore was shipped to the Benson Mining and Smelting Company for reduction. So far as I know, the ore did not more than pay the expenses of mining and reduction charges.

38 To the tenth interrogatory he saith: I drew upon the mining and smelting company against the ore shipped to them for reduction, and the proceeds of these drafts were expended upon the mine and in hauling ore; all other expenses incidental to the proper working of the mine. I never got a cent out of the venture, and the Benson Mining and Smelting Company's books show no balance coming to us, so far as I know.

To the eleventh interrogatory he saith: I made the arrangements with J. M. Luttrell entirely on my own account. No one else was interested in it but J. M. Luttrell and myself.

To the twelfth interrogatory he saith: Yes, sir.

To the thirteenth interrogatory he saith: None whatever.

To the fourteenth interrogatory he saith: There was a verbal agreement between J. M. Luttrell, the Benson Mining and Smelting Company, and myself that the ore should be shipped to the Benson Mining and Smelting Company, and that under that arrangement that they should advance money against the ore to be shipped. Mr. Salisbury, superintendent of the Benson Mining and Smelting Company, loaned us a hoisting-works engine and pump to facilitate the working of the mine in getting out the ore. The Benson Mining and Smelting Company were to be repaid for any advances made by them out of the proceeds of the ore shipped them after deducting their reduction charges.

To the fifteenth interrogatory he saith: As I have stated before, all the moneys received during the time I was connected with J. M. Luttrell in working the mine went to the expenses of working, mining, hauling, etc., and any other expenses incidental to such business.

39 To the sixteenth interrogatory he saith: During the time that J. M. Luttrell and I worked the mine there was expenses for labor alone — twenty-five hundred (2,500.00) to three thousand ($3,000.00) dollars per month. There was other expenses connected with working the mine, but I cannot possibly tell or even approximate it. We employed from 25 to 30 men about the mine, and the sum of from $2,500.00 to $3,000.00 per month was expended on an average for labor alone, and does not include any other expenses the mine might have been under.

To the seventeenth interrogatory he saith: We were not the owners of the engine hoisting works. As I said before, they were supplied by Mr. Salisbury to facilitate the working of the mine. We used the machinery four or five months. It was returned to Mr. Salisbury after we abandoned the mine.

To the eighteenth interrogatory he saith: When I left the mine I left orders in case it was proven that the title was not in us that the mine should be at once abandoned. It was some time in the latter part of 1883, but I am not certain as to the date. No notices were served on me. I only heard of one notice being served by William Keegan, and no more work was done by me. I don't know where any of the people who served the notices on the mine live, nor do I know any of them personally.

To the twentieth interrogatory he saith: There was no machinery on it except an old horse-whim, which was perfectly worthless and unfit to do anything. There was nothing to work the mine with, and everything had to be provided and paid for. I could not tell how much everything cost at this time. There were books kept at the mine which would show the expenses of the mine for the time of the existence of the agreement between Luttrell and myself. I don't know where the books are.

40 H. H. SCOTT.

Duly taken and sworn to before—

GEORGE F. KNOX,
Notary Public.

March 4th, 1886, San Francisco, Cal.

The defendant likewise produced a statement from its books of account showing the receipt by it from J. M. Luttrell during June and July, 1883, of 37,780 lbs. of ore from the Alta mine, the assay value of which, after deducting $20 per ton for reduction charges, was 1,654.88, which sum it had paid to Luttrell.

The defendant likewise prod-ced a statement from its books of account showing the receipt by it in September, October, November, and December, 1883, of 335,312 pounds of ore from the Alta mine, the assay value of which, af-er deducting $20 per ton reduction charges, was $10,061 & 77, which statement was identical as to the quantity of ore with the exhibit annexed to the deposition of J. M. Luttrell.

The defendant introduced and read the depositions of H. H. Scott and Monroe Salisbury.

MONROE SALISBURY, a witness for defendant, sworn, and examined by Mr. STEPHENS:

Q. What is your name?

A. Monroe Salisbury.

Q. Are y-u connected with the Benson Refining and Smelting Company?

A. Yes, sir.

Q. In what capacity?

A. General superintendent and general manager.

Q. Were you the superintendent and manager of the defendant corporation during the year 1883?

A. I was.

Q. Do you know a mine or mining claim in the Harshaw
41 district, in this Territory, called the Ben. Butler claim?

A. I do.

Q. When did you first know that claim or mine?

A. Some time in 1883. I think the fore part of 1883.

Q. During the year 1883 did the defendant corporation receive any ore from that mine for smelting purposes at the smelting works?

A. They did.

Q. Do you know who was working that mine during the time the Benson Refining and Smelting Company received ore?

A. Luttrell and Scott.

Q. Do you know what Luttrell's name was?

A. J. M.

Q. And Scott—what was Scott's name?

A. H. H. Scott.

Q. About what time did the Benson Refining and Smelting Co. first receive ore when Luttrell and Scott were working the mine?

A. In June or July, 1883. I cannot tell the exact date.

Q. In June, when you first received ore, were Luttrell and Scott working it together?

A. Luttrell was working it alone.

Q. Afterwards Scott went in with him?

A. Yes, sir.

Q. Did you as superintendent of the Benson Refining and Smelting Works or in any way take any steps or proceedings to ascertain the right of Luttrell or Luttrell and Scott to take ore from the mine?

A. I made a good many inquiries and required a good many affidavits as to the work performed. They gave me some. I don't know how many.

Q. As to the work performed?

A. As to the work performed on the "Ben. Butler" mine—that is, the work that is required by law as assessment on the mine. I don't know what company—the Alta or Ben. Butler, one or the other.

Q. You spoke of affidavits being taken with regard to the assessment work. Did you get any of those affidavits?

A. I saw some of them.

42 Q. Will you look at that affidavit, or that paper purporting to be an affidavit, and sta-e whether or not you recognize it as one of the affidavits you spoke of?

A. Yes, sir; that is one of the affidavits I saw.

Mr. STEPHENS: I now offer in evidence on behalf of the defendant the deposition of C. C. Watkins and ask to have it marked Defendant's Exhibit A.

It is so marked.

Q. Also will you look at that paper, purporting to be the affidavit of one M. Turner, and state if that is one of the affidavits you spoke of?

A. Yes, sir; that is one of them.

Mr. STEPHENS: I offer that as Defendant's Exhibits *Exhibit* B.

(The paper is so marked.)

—. Also please state whether that paper, purporting to be signed by Jeffords, is one of the affidavits you spoke of.

A. Yes, sir; that is one of them.

Mr. STEPHENS: I offer that as Exhibit D.

—. I will also ask you to look at that paper, purporting to be signed by H. B. Clay, and state whether y-u can identify it as one of the affidavits you alluded to.

A. Yes, sir.

Mr. STEPHENS: We offer it in evidence and mark it Exhibit D.

Q. I will ask you to look at a paper signed by Charles Dunn, Jr., and state whether that is one of the affidavits you alluded to.

A. Yes, sir.

Mr. STEPHENS: We offer it and mark it Defendant's Exhibit E.

Q. In addition to the affidavits you speak of, did you take any other steps to ascertain the r-ght of Luttrell and Scott or either of them to work the mine?

A. I was on the ground myself once or twice.

Q. Did you send any one to look into the matter to see whether they had a right to work that mine claimed?

43 A. Yes, sir; I think I sent Mr. Stephens once.

Q. Did Mr. Stephens make any report to you about the matter?

A. Stephens reported that he thought the work had not been done—the amount required by law.

Q. Were you at any time ever notified by any person or persons as to any claim of title being held by any one superior to the claim of Luttrell or of Luttrell and Scott?

A. Yes, sir. In San Francisco, about December first, 1883, a gentleman came to me—and he either represented himself as an attorney of the company or the agent—and claimed that they had applied for a patent. He claimed that he was the agent.

Q. What did you do?

A. I notified them that I would not buy any more ores and remove the machinery.

Q. Notified who?

A. Notified Scott and Luttrell that I would not make any more advances to them.

Q. Did you ever received any other notifications?

A. No, sir.

Q. That was in December, 1883?

A. Yes, sir.

Q. Do you know who that gentleman was?

A. I can't remember the name.

Q. Did you receive any more ore after notification?

A. I am not positive. They might have received some that was out or on the road. There was no more mined.

Q. Can you tell how much ore was received from that mine by the Benson Refining and Smelting Company from the first of June, 1883, to the first of December, 1883?

A. I could not tell.

Q. Were any books kept?

A. Yes, sir.

Q. The weight in value?

A. Yes, sir.

Q. Who kept the books?

A. Mr. Boyer.

Q. Was the Benson Smelting and Refining Co. interested in the working of this mine other than working the ore that was brought from it?

A. No, sir; it was not.

44 Q. What was done with the proceeds of the ore after taking out the smelting charges?

A. It was generally paid by orders on my from Luttrell for wages of men, &c.

Q. The books kept at the smelting works show the amount of money so paid?

A. Yes, sir.

Q. You spoke of machinery just now. Did you supply the Ben. Butler mine or Scott and Luttrell with machinery?

A. A little hoister and a little engine.

Q. What did you loan them that for?

A. To facilitate getting ore. The machinery was not in use, so I loaned it to them.

Q. What time did you visit that mine—the Ben. Butler or Old Man or whatever it was?

A. Well, in 1883—I could not tell you exactly—about July or August, I think.

Q. Do you remember the condition of the mine then in regard to machinery?

A. There was none on it at the time I first went there.

Q. None on it at all?

A. None on it at all.

Q. Who was working in them—Luttrell or Luttrell and Scott?

A. Luttrell was working it, according to my recollection.

Q. Who had the immediate charge of the furnaces down at Benson, at the Benson Refining and Smelting Works, in 1883?

A. Austin Carrington.

Cross-examination.

By Mr. ANDERSON:

Q. Mr. Salisbury, will you look at that paper and state to me who it was written by and to whom it is written?

A. It was written by me, sir, to Mr. Luttrell.

Q. About what?

A. About the same mine.

Mr. ANDERSON: I offer it as Plaintiff's Exhibit 1.

Q. Will you look at that letter (showing another) and tell who it is written by and to whom it is written?

45 A. Well, that is not my writing.

Q. Is that your signature?

A. That is my signature; Mr. Boyer's writing, I think.

Q. The letter is signed by you?

A. Yes, sir; it is not my writing; it is signed by me.

Q. What does the little b mean?

A. Boyer, I think.

Q. Did he have any authority to sign the letter for you?

A. I don't know whether he did or not. I guess he used to sign them sometimes.

Q. To whom is that addressed?

A. That seems to be addressed to Mr. Luttrell.

Q. Do you know what attorney is referred to in there?
A. I do not, sir.

Mr. ANDERSON: I offer this letter as Plaintiff's Exhibit 2.

Mr. STEPHENS: I object to it on the ground that it is irrelevant, incompetent, and immaterial. It is not signed by Mr. Salisbury, and no authority has been shown by the plaintiff to sign letters on behalf of Mr. Salisbury.

Mr. ANDERSON: Did Mr. Boyer have authority to sign your name?
A. He did sign my name.
Q. To letters?
A. Yes, sir.
Q. When did you first hear of the Alta mine?
A. Well, some time in 1883. I could not give you the exact date.
Q. Is that the first time you ever heard of the Alta mine?
A. So far as I recollect now.
Q. How long have you been operating in Benson?
A. About three years, I think.
Q. From this date—from now, you mean?
—. Yes, sir.
Q. Since what year, as near as you can give it?
A. I think the latter part of 1882.

46 Mr. STEPHENS:

Q. Look at this paper marked Plaintiff's Exhibit 1 and state if you have any explanation to make. State what you mean by "the mine in my interest."

A. I mean that Luttrell was wanting advances on his ore. It was very necessary to know whether he was going to get out any ore to pay me.

Q. Do you mean your interest or the Benson Smelting and Mining Company's when you say "my"?

A. I mean the company, because I own so much of it.

Q. You were desireous of extracting as much ore as you could from that mine or any other mine for smelting purposes?

A. Yes, sir.

Q. And, as I understand it, all your interest was to get as much ore as you could to keep the furnace running?

A. Yes, sir; and make a little profit on it.

Q. It did not make any difference whether you got it from the Alta mine or not as long as you got it some place?

A. Not a bit of difference.

Q. Please look at this paper marked Plaintiff's Exhibit 2, and tell whether you remember that letter being sent.

A. No, sir; I don't remember anything about the letter.

Q. Look at the date of it, Sept. 20th, 1883. At that time had you heard anything about any conflicting claim to the Ben. Butler mine?

A. There had always been some talk about a conflicting claim, because it was a mine taken up or located by Mr. Luttrell on ac-

count of the assessment work not being done. That was the reason I investigated the title so much.

Q. To see if Luttrell had the right to extract that ore?

A. Yes, sir; I guess Mr. Bower could tell more about that letter than I can.

MONROE SALISBURY.

47 BENSON MINING AND SMELTING COMPANY,
BENSON, A. T., *Aug. 18th*, 188–.

Mr. J. M. Luttrell.

DEAR SIR: The bearer, H. H. Scott, is my brother-in-law, and came to see you about the mine in my interest. Please show and tell him everything connected with mine; also let him sample mine thoroughly.

Yours truly, M. SALISBURY.

BENSON SMELTING AND MINING COMPANY,
BENSON, A. T., *Sept. 20th*, 1883.

J. M. Luttrell, Esq.

DEAR SIR: The attorney for the Alta mine will be at Harshaw on next Sunday or Monday. Scott or I will be with him. You want to have things in shape to show that you are right, and that your title is good, and that you are very solid. I think it very important that this attorney is convinced of these facts.

Take out ore as fast as possible. Have sent to Tucson for pipes and fixtures, which your telegram calls for, and will forward immediately; have sent you $200 by express to Crittenden.

Yours truly, M. SALISBURY.

48 PIMA COUNTY, }
Territory of Arizona. }

John T. Jeffords, being first duly sworn, deposes and says that he was at and upon the Alta mine, situated in the Harshaw mining district, said county and Territory, on the first day of January, 1883, and that he there saw and examined the work claimed to be the assessment work on said mine for the year 1882, and that said work did not constitute one hundred dollars assessment work at five dollars per day, and that said work could have been reasonably done by one man in eight days.

Said work is situated about three hundred feet northerly from the main shaft of said mine and about two hundred feet southerly from the wagon road.

JOHN T. JEFFORDS.

Sworn and subscribed to before me this 24th day of September, 1883.

J. H. TURNER,
Justice of the Peace in and for the County of Pima, Territory of Arizona.

49 COUNTY OF PIMA, }
Territory of Arizona. }

That. Turner, being duly sworn, deposes and says that he is a resident of Harshaw, said county and Territory, and is well acquainted with the assessment work done and performed on the mine formerly known as the Alta and now as the Ben. Butler for the year 1882, said — being situated in Harshaw mining district, said county and Territory, and that the work done does not constitute one hundred dollars, at five dollars per day to the man, and that all of said work claimed to be the assessment work on said mine could have been done in five days by one man. The said work is situated about three hundred feet northerly from the main shaft of said mine and about two hundred feet southerly from the wagon road.

MATT. TURNER.

Sworn and subscribed to before me this 24th day of Sept., 1883.

J. H. TURNER,
Justice of the Peace on and for the County of Pima, Territory of Arizona.

50 TERRITORY OF ARIZONA, }
County of Pima. }

Charles Dunne, being duly sworn, on oath deposes and says that he was present on or about the 10th day of January, 1883, when J. M. Luttrell located and posted his notice on the Ben. Butler mine, formerly known as the Alta mine; that at the time and date of said location made by J. M. Luttrell he (said), J. M. Luttrell, builts his monuments and posted his notice in one of said monuments in accordance — the miners' rules and customs. Affiant further avers that at the time said J. M. Luttrell made said above-mentioned location of the Ben. Butler mine he (affiant) examined the work done on the Alta mine for the year 1882 as the annual assessment work on said Alta mine; that all of said assessment work was not more than the value of thirty dollars, and that all of said assessment work could be done by one man in less than six days.

Affiant makes the above statement in regard to the value of the assessment work above referred to as a practical miners and as being acquainted with the ground worked on the "Alta mine" for the year 1882 as the assessment work for that year.

CHAS. DUNNE.

Subscribed and sworn to before me this 27th day of Sept., A. D. 1883.

J. H. TURNER,
Notary Public.

51 JOSEPH BOWER, a witness for the defendant, testified:

Was the book-keeper for the defendant in 1883 and was till in its employ. Witness identified the statements produced by the defendant as correct. The letter annexed to the deposition of M.

Salisbury dated Benson, A. T., Sept. 25th, 1883, was written by witness under the direction of Salisbury.

JOS. BOYER.

Duly read, corrected, and sworn to.

A. CARRINGTON, a witness for the defendant, testified:

Was manager of the defendant at the smelter at Benson in 1883; received all the ore that came from the Alta mine. At first Luttrell run the mine himself and defendant purchased his ore, paying him the assay value less 20 dols. per ton reduction charges. Luttrell did what he pleased with his money. After that Luttrell and Scott made their agreement and the understanding was that the defendant should receive the ore and after deduction the reduction charges of $20 per ton it should pay out of the proceeds of the ore for the expenses attendant upon the working of the mine and for the transportation of the ores, and pay over the surplus to Luttrell and Scott.

James Finley was superintendent for a time, and then J. M. Day. Witness personally attended to the receipt of the ores and the payment of the expenses. Witness knew personally that the cost of hauling from the mine to the railroad was $5 per ton and the railroad freight to Benson was $3.10 per ton, but knew nothing else of the expenses of his own knowledge. The ore received under the Scott and Luttrell contract, after taking out the reduction charges, came to $10,061.47. The defendant paid all that amount and $493.70 more. When the mine was shut down defendant, to balance its accounts, credited Scott and Luttrell with the following:

Wood sold at Harshaw	$54 30
Traveling expenses	65 00
Tools and materials	374 40
Total	$493 70

52 The men at the mine were paid upon pay-rolls for September and October, which the witness produced as follows:

September Pay-Roll.

M. D. Cooley, miner	$44 00
M. D. Cooley, foreman	50 00
E. R. Langford, engineer	122 50
A. H. Johnson, "	36 00
Nat. Turner, topman	94 00
J. T. Taylor, miner	112 00
C. A. Case, "	72 00
L. Wilson, "	28 00
L. Wilson, laborer	21 00
V. R. Barnett, "	76 00
C. C. Watkins, "	120 00
J. G. Best, miner	66 00
J. R. Cary, "	28 00

M. Sloan,	miner	$116 00
H. Davidson,	"	48 00
H. Droge,	"	36 00
J. M. Lewis,	"	36 00
Ben. Roth,	"	12 00
Pat. Sullivan,	"	8 00
John Madden,	"	4 00
J. H. Abrams,	"	56 00
Total		$1,185 50

October Pay-Roll.

L. Wilson,	miner	$79 00
J. G. Best,	topman	72 00
F. A. Lamont,	miner	88 00
E. R. Langford,	engineer	167 50
A. H. Johnson,	"	124 00
N. Turner,	topman	121 00
J. T. Taylor,	miner	120 00
C. A. Case,	"	120 00
V. R. Barnett,	"	120 00
C. C. Watkins,	"	120 00
J. R. Carty,	"	120 00
M. Sloan,	"	74 00
H. Davidson,	"	116 00
H. Droge,	miner	122 00
J. M. Lewis,	"	120 00
M. D. Cooley,	foreman	155 00
B. Roth,	miner	108 00
P. Ingram,	"	98 00
John Wickstead,	blk.	108 00
George Seay,	miner	68 00
E. C. McDonald,	"	80 00
W. M. Roberts,	"	68 00
H. Griffin,	"	36 00
John Nash,	"	36 00
M. T. Davis,	"	32 00
R. H. Jones,	"	28 00
Total		$2,500 50

The witness further produced vouchers for the payment of money by the defendant for account of Scott and Luttrell as follows:

1883.					
Sept.	6.	No.	194.	J. M. Luttrell	$700 00
"	25.	"	74.	R. R. freight, 18,000 lbs.	20 25
"	26.	"	83.	Traveling (Salisbury & Scott)	15 00
"	29.	"	898.	R. R. freight, 22,500 lbs.	25 31
Oct.	5.	"	115.	Traveling & service, J. M. Pickett	104 25
"	5.	"	120.	J. M. Luttrell	200 00
"	6.	"	124.	R. R. freight, 27,000 lbs.	30 38
"	8.	"	135.	Merchandise	5 50
"	6.	"	130.	Expressage	4 25

Oct.	6.	No.	140.	J. T. Wilson, expenses and work		$62 50
"	11.	"	144.	10 c'ks by Finley, supt., drawn on M. Salisbury		639 82
				F. Salcido, water	$3 00	
53				Roth & Cooper, coal & wood	51 80	
				John Rusher, freight	60 49	
				James Finley, material	242 92	
54				T. J. Capps, freight	26 75	
				Other five checks on pay-roll.		
				9 c'ks by Finley, supt.		738 54
Oct.	13.	No.	156.	John Susher, freight	$100 00	
				J. H. Turner, lumber	136 74	
				Other 7 checks on pay-roll.		
	"	"	151.	R. R. freight, 40,620 lbs.		52 39
	18.	"	159.	8 checks by Finley, supt.		254 31
				J. M. Luttrell	57 17	
				L. Wilson	26 50	
				James Finley, salary	35 00	
				Pat. Ryan, boots	20 00	
				Other 4 c'ks on pay-roll.		
	"	"	160.	J. M. Luttrell		100 00
	22.	"	169.	R. R. freight, 28,400 lbs.		63 62
	23.	"	172.	Explosives		88 65
	25.	"	175.	3 c'ks by Finley, supt.		165 00
				J. M. Claiborne, explosives	29 00	
				Other 2 checks on pay-roll.		
"	"	"	176.	J. M. Luttrell		100 00
"	27.	"	188.	R. R. freight, 15,900 lbs.		35 62
"	31.	"	193.	W. C. Keegan, lumber		85 85
"	"	"	194.	R. R. freight, 37,500 lbs.		77 00
Nov.	5.	"	202.	Traveling (H. H. Scott)		18 00
"	"	"	203.	4 c'ks by Finley, supt.		189 03
				John Christie, hauling	20 73	
				J. M. Luttrell	25 00	
				Other 2 c'ks on pay-roll.		
"	7.	"	208.	Merchandise		33 92
"	"	"	211.	7 checks by Finley, supt.		571 50
				John Christie, hauling	16 00	
				A. Serna, wood	10 00	
				J. Finley, materials	165 53	
				J. Finley, salary	100 00	
				Other 3 checks on pay-roll.		
			212.	7 checks by Finley, supt.		589 40
				A. Serna, wood	60 00	
				J. W. Leek, hauling	6 10	
				John Rusher, freight	147 28	
				Smith & Baum, mdse.	14 02	
				Other 3 checks on pay-roll.		
"	9.	"	215.	Check by Scott, favor Barnett, on pay-roll		12 00
"	9.	"	220.	8 c'ks by Finley, supt.		914 12
				All on pay-roll.		
"	"	"	228.	Traveling (H. H. Scott)		24 00
"	10.	"	232.	4 checks by Finley		338 50
				John Rusher, freight	140 00	
55				" " "	30 00	
				Other 2 checks on pay-roll.		
Nov.	10.	"	233.	R. R. freight, 55,600 lbs.		66 09
"	12.	"	251.	Merchandise		61 50
"	"	"	245.	Expressage		4 70
"	16.	"	255.	5 checks by Finley, supt.		260 50
				T. J. Capps, hauling	$20 50	
				John Rusher, freight	25 00	
				Other 3 checks on pay-roll.		
"	17.	"	257.	W. C. Keegan, water		6 00
"	22.	"	265.	Lumber		46 00
"	"	"	267.	James M. Day, salary		50 00
"	24.	"	268.	R. R. freight, 49,350 lbs.		66 25

Nov.	26.	No.	277.	5 checks by J. H. Day		$132 45
				C. C. Watkins, pay-roll	$17 83	
				George Seay, "	16 00	
				J. Wickstead, "	47 40	
				P. Ingram, "	31 12	
				J. H. Day, salary	20 00	
"	27.	"	259.	R. R. freight, 36,280 lbs.		56 11
"	30.	"	280.	" " 19,200 lbs.		26 98
"	"	"	284.	2 checks by J. H. Day		102 50
				A. Serna, wood	$90 00	
				C. Vanderslip	12 00	
Dec.	3.	"	285.	13 checks by J. H. Day		844 51
				C. A. Case, pay-roll	74 36	
				A. H. Johnson, pay-roll	13 19	
				E. A. Langford, "	165 64	
				H. Griffin, "	64 64	
				J. Nash,	92 00	
				H. Davidson, "	92 00	
				J. T. Taylor, "	88 00	
				M. D. Cooley, "	126 64	
				D. Murphy,	62 00	
				T. Keath,	62 00	
				E. D. Woods, "	40 04	
				G. M. Norton,	4 00	
				G. M. Norton,	20 00	
"	"	"	286.	2 checks by J. M. Day		97 76
				A. H. Johnson, pay-roll	57 17	
				J. Finley, salary	40 46	
"	"	"	290.	19 checks by J. M. Day		898 39
				B. Roth, pay-roll	56 64	
				J. R. Carty, "	64 00	
				E. E. McDonald, pay-roll	64 00	
				J. M. Lewis, "	20 00	
				H. Droge, "	96 00	
				M. T. Davis, "	80 00	
				C. C. Watkins, "	41 00	
				W. M. Roberts, "	12 00	
				R. H. Jones, "	28 00	
				R. H. Jones, "	64 00	
				W. Keegan, "	48 25	
56				J. M. Luttrell, "	50 00	
				M. Echold, "	15 00	
				J. M. Day, salary	50 00	
				S. B. Mann	8 00	
				F. Tonge	76 00	
				John Rusher, freight	100 00	
				W. Keegan	17 50	
				A. G. Watkins, packing	8 00	
Dec.	4.	"	293.	Merchandise		15 80
"	10.	"	320.	Order by J. M. Day, favor John Rusher, freight		150 00
"	11.	"	328.	J. M. Luttrell		25 00
"	18.	"	341.	4 checks by J. M. Day		304 97
				T. J. Capps, hauling	$27 00	
				R. Ramon	12 00	
				A. Seworth, board pay-roll	224 72	
				A. Seworth, " "	41 25	
"	22.	"	355.	Traveling, J. M. Day		38 00
"	22.	"	359.	Explosives, W. A. Scott, Jr.		133 65
"	27.	"	377.	J. M. Luttrell, receipt to the defendant in full for all acc'ts to date, Dec. 24th, in settlement of acc't of Scott & Luttrell		100 00
1884.						
Jan.	4.	"	395.	2 checks by J. M. Day		104 35
				Smith & Baugh, mdse.	26 35	
				John Rusher, freight	75 00	
Feb.	2.	"	473.	Check by J. M. Day to Jeffords		9 00

Feb.	14.	No. 498.	Check by J. M. Day to M. Echold	$12 00
Mar.	24.	" 576.	Merchandise	4 00
			Total	$9,895 22

57 It was agreed between counsel that the following was a correct recapitulation of the contents of the vouchers produced by the witness Carrington, to wit:

The September pay-roll, including board, aggregated	$1,185 50
The October pay-roll, including board, aggregated	2,500 50
There was no pay-roll for November, and the work was stopped about the 20th to the 25th; but the names of 25 persons who had been on the October pay-roll appear as the payees of checks given by J. M. Day, which aggregate $1,351.63, which, if the board bill for November, amounting to $265.97 (see checks paid to A. Seworth Dec. 18th), be added thereto, will probable make up the correct pay-roll for November	1,617 60
Total cost of labor at mine	$5,303 60
Railroad freight, cost	540 09
Wagon " "	952 85
Traveling, "	95 00
Coal and wood, "	211 80
Explosives, "	251 30
Tools and supplies, "	407 92
Merchandise, "	164 09
Lumber, "	268 59
Water, "	9 00
Expressage, "	8 95
There was paid to J. M. Luttrell	1,357 17
" " James Finley, sup't, salary	175 46
" " James M. Day, sup't, salary	120 00
" " J. I. Wilson	62 50
" " L. Wilson	26 50
" " J. M. Pickett	104 25
" " Pat. Ryan, boots	20 00
" " E. Venderslip	12 50
" " G. M. Norton	24 00
" " E. D. Woods	40 04
" " T. Keith	62 00
" " D. Murphy	62 00
" " W. Keegan	65 75
" " M. Echold	27 00
" " S. B. Mann	8 00
" " F. Tonge	76 00
" " R. Ramon	12 00
" " John Jeffords	9 00
Total	$10,477 36

58 First Judicial District Court, Pima County, Arizona.

THE ALTA MINING & SMELTING COMPANY
vs.
THE BENSON MINING AND SMELTING COMPANY. } Findings.

This cause having been regularly called for trial before the court (a jury having been expressly waived by the parties in open court), Messrs. Haynes & Stiles and J. A Anderson appearing for the plaintiff, and Messrs. Earll, Campbell, and Stephens appearing for the defendant, the court heard the proofs of the respective parties and considered the same, with the records and papers in the cause and the arguments of the respective counsel; and the cause having been submitted to the court for its decisions, the court now finds the following facts:

1. That previous to the first day of June, 1883, and at all times thereafter to the commencement of this action plaintiff was the owner of the Alta mine, situated in the Harshaw mining district, Pima county, Arizona, and had upon the — day of September, 1879, by its grantors, entered and paid for said mine at the U. S. land office of the district of lands in which it was situated, and was entitled to receive a patent therefor from the United States.

2. That in the months of June and July, 1883, one J. M. Luttrell entered upon said Alta mine and mined and took therefrom 37,780 pounds of silver-bearing ores without the consent of the plaintiff, which ores said Luttrell delivered to the defendant at its smelter at Benson, Cochise county, Arizona, in said months of June and July, 1883, and which ores said defendant then and there converted to its own use without the consent of the plaintiff.

3. That at the time of the conversion of said ores by the defendant the said ores were of the value of $1,654.88.

4. That during the months of September, October, November, 1883, the said Luttrell and one H. H. Scott entered upon said
59 Alta mine and mined and took therefrom 335,312 pounds of silver-bearing ores without the consent of the plaintiff, which ores said Luttrell and Scott delivered to the defendant at its said smelter in said months of September, October, Nov., 1883, and which said ores said defendant then and there converted to its own use without the consent of the plaintiff.

5. That at the time of the conversion of said last-mentioned ores by the defendant the same were of the value of $10,061.77.

6. That the said ores, at the times of their said conversions by defendant, were in all 373,092 pounds, or 186.246 tons, and were of the total value of 11,716.65.

7. That after the times when said ores had been dug, broken down, and mined from said mine and had become chattels the defendant and said Luttrell and said Scott expended the sum of $7,985.83 in removing said ores from said mine and in assorting the same from the worthless rock and debris and in transporting the same to said smelter.

8. That said ores at the times when they first became chattels in

said mine were of the value of $20 per ton and of the total value of $3,730.82.

9. That the said entries and trespasses of said Luttrell and Scott upon said Alta mine were each and all with knowledge of plaintiff's ownership thereof.

10. That defendant at the time it received said ores had knowledge that they came from said Alta mine and that they were the property of the plaintiff.

And, as conclusions of law from the foregoing facts, the court hereby finds and decides:

1. That at all the times after the said ores were dug, mined, and extracted from their place in said mine said ores were chattels and were the property of the plaintiff.

2. That plaintiff is entitled to have and recover the value of said chattels at the smelter of the defendant at Benson, to wit, the sum of $11,716.55, less the cost of removing said ores from said mine and in assorting the same from the worthless rock and debris and in transporting the same to said smelter, to wit, the sum of $7,985.83, viz., $3,730.82, with interest thereon at the rate of ten per cent. per annum from the date of conversion, to wit, from the first of
60 December, 1883, in the sum of $859.24, making total judgment $4,590.06, and for its lawful percentage in the sum of $127.82, and its cost herein, to be taxed.

And judgment is hereby ordered to be entered accordingly.

Dated Tucson, Arizona, March 22nd, 1886.

W. H. BARNES,
Judge 1st Dist.

Indorsed: Filed March 29th, 1886. J. H. Martin, clerk.

61 The defense rested, and no further evidence was given or offered.

The cause was thereupon argued by the respective counsel and submitted for decision, and thereafter, on the 22nd day of March, 1886, the court, having considered the same, ordered findings to be prepared and filed therein, which was done on the 29th day of March, A. D. 1886, and which are annexed hereto and made a part hereof, and judgment was thereupon rendered therein in favor of plaintiff and against defendant for principal damages, $3,730.82; interest, $859.24, and in the aggregate $4,590.06, and lawful percentage to the amount of $121.82 and costs, $57.20.

The foregoing was all the testimony given and all the proceedings had in the above-entitled cause on the trial thereof, and the defendant herein now assigns and specifies the errors and particular grounds of error on which it will rely on the motion for a new trial herein and on appeal, in case said motion be denied, as follows, to wit:

The evidence is insufficient to support the first finding of fact in this: That there is no evidence showing or tending to show that plaintiff, by its grantors, on the 10th day of September, 1879, or over, entered or paid for said mine at any United States land office whatever.

The second finding of fact is not sustained by the evidence, and among other things in this: That there is no evidence to show or tending to show that the defendant converted said ores to its own use or so did without the consent of the plaintiff, or that Luttrell entered upon said property without the consent of plaintiff, or that said ores when in place were of any value whatever.

The third finding of fact is not sustained by the evidence in this: That there is no evidence showing or tending to show that the ore mentioned therein was ever of the value of $1,654.88 or of any value, or when, if ever, said mentioned conversion took place.

The fourth finding of fact is not sustained by the evidence in this: That there is no evidence showing or tending to show that Luttrell or Scot ever entered upon said mine or took any of said ores without the consent of the plaintiff, or that defendant ever converted any part of said ores to its own use or without the consent of the plaintiff.

The fifth finding of fact is not sustained by the evidence and the evidence is insufficient to support it in this: That there is no
62 evidence showing or tending to show that said ores were at any time or ever of the value of $10,061.77 or of any other value or sum of money whatever, or that the said ore in place was of any value whatever.

The evidence is insufficient to support the 6th finding in this: That there is no evidence showing or tending to show that said ores were at the uncertain, undetermined, and unfixed time called in the said finding the "time of conversion" or at any time was or is of the total value of $11,716.65 or of any value whatever. On the contrary, it appears from the evidence of Luttrell, Bowyer, and Carrington that said ores in place and also when broken down and severed from the vein had no value whatever, the expense of their reduction, transportation, and mining exceeding their said value when in place and when broken down, severed, and assorted.

The evidence is insufficient to support the 7th finding in this: There is no evidence showing or tending to show that after the times when said ores had been dug, broken down, and mined from the said mine and became chattels that defendant and said Luttrell and said Scott or either or all of them expended only the sum of $7,985.83 in removing said ores from said mine and in assorting the same from the worthless rock and debris and in transporting the same to said smelter; but, on the contrary, the evidence of Luttrell, Scott, Carrington, and Bowyer and Salisbury show that said expenses were fully the sum of $11,716.65 more than the total value of said ores ever or at any time or place whatever.

The evidence is insufficient to support the 8th finding of fact in this: There is no evidence showing or tending to show that when said ores first became chattels (*i. e.*, severed from the mine) in said mine they were of the value of $20 per ton or of any value whatever or of the total of $3,730.82 or of any value.

The evidence is insufficient to sustain the 9th finding of fact in this: That there is no evidence showing or tending to show that any entry of said Luttrell or Scott or of Luttrell & Scott on said

mine was a trespass or was willful or with the knowledge of plaintiff's ownership thereof or therein.

63 The evidence is insufficient to sustain the 10th finding of fact in this: That there is no evidence showing or tending to show that at any of the times the defendant received said ores — had any knowledge whatever that they were the proper-y of the plaintiff or that plaintiff had any claim thereto.

That each and all of said findings are defective, and the court erred as a matter of law in so finding on the ground that the evidence shows without contradiction that the plaintiff, a foreign corporation, had never relied for title upon the entry and payment for said property made by its pred-cessors in alleged title in 1879 in the United States land office or had ever considered it of any force or value, but had done and cause- to bo done the necessary annual assessment works on said mine in the years 1880 and 1881, and had in fact and in law abandoned the said mine and did not do the necessary annual assessment work thereon in 1882, and that in January, 1883, the said Luttrell, who was competent and qualified to locate mineral claim under the provisions of the laws of the United States, openly and in good faith entered upon said mining claim, believing and having good reason to believe that the same had been abandoned -nd deserted and was a portion of the unoccupied public mineral land of the United States, and open- the location and duly located the same under the name of the "Ben. Butler" mine; that said entry and location was peac-able, open, an- notorious; that at the said time said plaintiff had a duly appointed agent in said county, J. S. Wood, and that neither the said plaintiff nor the said Wood made any objection to the entry or location of said Luttrell nor to his said or any subsequent possession or working of said mine and disposal of said ores; that the said Scott, in good faith, for a valuable consideration, and without knowledge of plaintiff's claim thereto, afterwards purchased an interest therein from said Luttrell; that the defendant was engaged in the business of a custom smelter during the year 1883, and, in good faith, without notice or knowledge of plaintiff's claim, and after diligent enquiry by the said Salisbury to ascertain the real title to the said property, openly, notoriously, and in the usual course of business, without objection or protest on the part of the plaintiff, received

64 said ores from said Luttrell and Scott, reduced said ores, charging therefor the usual reduction charges, and accounting and paying to said Luttrell and Scott the net marketable value of the silver extracted therefrom, less said reduction charges in the way of advances to Luttrell and Scott in the mining and transportation of said ores, and that the mining and transportation of said ores exceeded the value of the ore in place or when severe- from the vein or when at the mouth of the mine.

The evidence uncontradicted further shows that the defendant was not a trespasser upon said mining claim at any time whatever or at all, but that it was an innocent vendee from Luttrell and Scott, who were unintentional or mistaken trespassors; that said ore was converted in place and then had no value whatever, and that, deduct-

ing the amount added to its value by defendant and its vendors, it had no value whatever and was mined, assorted, transported, and reduced at a loss, and was assorted and transported at a loss; that at the time of its purchase said ore had no value whatever.

The errors of law committed by the court are as follows:

In the first conclusion thereof the court erred in finding and deciding that at any time the property mentioned therein was the property of plaintiff, because the evidence shows no title in plaintiff to the said ores, or that if it ever had such title it was estopped from asserting the same.

In the second conclusion thereof the court erred in finding and deciding that plaintiff is entitled to have or recover the found net sum $3,730.82 or $859.29 or $121.82, or any other sum of money or thing of value whatever, on the grounds hereinabove stated, and on the further ground that there is no evidence tending to sustain the finding, and the evidence of the case shows uncontradicted that plaintiff has suffered neither loss nor damage herein in any of the said sums nor in any sum of money whatever nor at all.

And defendant prays that its foregoing statement, with all its assignments of errors, may be signed, settled, and made a part of the record herein, which is done this 12th day of November, A. D. 1886.

65 WM. H. BARNES,
Associate Justice Supreme Court of Arizona and ex Officio Judge of 1st Judicial District of Arizona Territory.

EARLL, CAMPBELL AND STEPHENS,
Defendant's Attorneys.

Received a copy of the foregoing statement this the 2nd day of June, A. D. 1886, within stipulated time, and it is stipulated that the findings and exhibits herein referred to and made a part hereof shall be considered as attached hereto and made a part hereof and may be used as such by both parties hereto on the hearing of this motion, and on appeal may be annexed hereto and made a part of this statement on apeal with the same force and effect as if now attached and made a part hereof.

HAYNES, STILES, AND J. A. ANDERSON,
Plaintiff's Attorneys.
EARLL, COMPBELL AND STEPHENS,
Defendant's Attorneys.

Indorsed: Engrossed and settled statement on motion for a new trial. Filed June 8th, 1886. J. H. Martin, clerk.

66 (Title of the Court and Cause.)

Order Overruling Motion for New Trial.

The court having considered this case and the argument of

counsel and being advised sufficiently, it is order- that the motion for new trial be overruled.

WM. H. BARNES, *Judge, &c.*

Judge's chambers, first judicial district, Tucson, Arizona, Dec. 6th, 1886.

Indorsed: Filed Dec. 6th, 1886. J. H. Martin, clerk.

67 (Title of the Coset and Cause.)

Notice of Appeal.

To said plaintiff, the clerk of said court, and Messrs. J. A. Anderson and Haynes and Stiles, plaintiff's attorneys:

You will take notice that the above-named defendant hereby appeals to the supreme court of the Territory of Arizona from the judgment made, rendered, and entered in the above-entitled cause and district court on the 29th day of March, A. D. 1886, in favor of plaintiff and against defendant, and from the whole thereof, and also from the order of said district court made Dec. 6th, 1886, and entered herein on the 6th day of Dec., A. D. 1886, denying the said defendant's motion for a new trial.

Very respectfully,

EARLL, CAMPBELL AND STEPHENS,
Defendant's Attorneys.

Indorsed: Filed December 14th, 1886. J. H. Martin, clerk.

68 & 69 (Title of Coort and Cause.)

Stipulation.

It is hereby stipulated and certified by the attorneys of the respective parties hereto taat the foregoing transcript of the record in the above-entitled cause is correct, and that an undertaking on appeal in manner and form and amount as required by law has been filed herein.

—— ——, *Plaintiff's Attorneys.*
EARLL, CAMPBELL AND STEPHENS,
Defendant's Attorneys.
T. L. STILES, *Of Counsel for Plaintiff.*

Dated Tucson, Arizona, January 28th, A. D. 1887.

70 Court met Tuesday, March 13th, 1888, pursuant to adjournment.

Present: His Hon. James H. Wright, W. H. Barnes, and Wm. W. Porter, U. S. dist. att'y; E. B. Dodge, clerk and crier.

ALTA MINING CO.
vs.
BENSON MINING CO.

Motion for rehearing having been under advisement, it is by

order of the court overruled and denied; whereupon Geo. G. Berry, attorney for appellant, gives notice of appeal in open court to the Supreme Court of the United States, which said appeal to said court is allowed; and it is further ordered that the Hon. Wm. H. Barnes, the justice of the supreme court from the first judicial district of said Territory, be, and he is hereby, authorized to fix the amount of the supersedeas bond and to approve the same within the time prescribed by the Rev. Statutes of the United States.

JAMES H. WRIGHT,
Chief Justice.

71 In the Supreme Court of the Territory of Arizona, January Term, 1887.

Submitted at the adjourned term in April, 1887.

THE ALTA MINING AND SMELTING CO., Plaintiff & Appellee,
vs.
THE BENSON MINING AND SMELTING CO., Defendant and Appellant.

Before Barnes, District Judge.

Appeal from Pima county.

Mr. C. C. Stephens, attorney for appellant; Mr. Geo. G. Berry, of counsel; Mess. Haynes & Stiles and J. A. Anderson, attorneys for appellee.

This case was tried at the March term, 1886, of the district court of Pima county, before the court sitting as a jury. The suit was brought by the appellee in February, 1885, to recover for the value of certain ore which it alleged had been taken from the Alta mine, in Harshaw mining district, in Pima county, and converted by appellant to its own use. From the record it appears that Fagan, Harshaw, and others owned the Alta mine prior and up to September, 1879; that about — time they made regular entry and payment for the same in the proper local U. S. land office and got a certificate of purchase, and then sold and conveyed the mine to the appellee. In the usual course of the administration of affairs at the Land Office at Washington a patent was issued in Jan., 1884. Appellant is a corporation organized under the laws of California. Appellee is a corporation organized under the laws of New York. After the purchase the appellee took possession and worked the mine extensively up to 1882. In that year it did but little work upon the mine—less than $100.00 worth. On the 1st of January of the following year J. M. Luttrell, possibly in the honest belief that by reason of $100.00 worth of work not being done in 1882 the Alta mine was subject to relocation as forfeited mineral land, attempted a relocation of it under the name of Ben. Butler mine. Under this pretense only, as the record shows,
72 Luttrell took possession of the mine, and early in the summer of 1883 took from it about 19 tons of ore, which appellant bought and reduced to bullion at its smelter. In the

latter part of the summer of 1883 Luttrell made a contract with H. H. Scott, by which Scott was to furnish machinery, money, &c., for the further working of the mine for one-half the net profits. Now, Scott was — brother-in-law of Salisbury, the president and manager of appellant, The Benson Mining and Smelting Co., and was sent to Luttrell in the interest of appellant, as explained by Salisbury himself. The machinery and means which Scott was to furnish were furnished by appellant. It paid the wage-workers, furnished the pay-rolls; in short, the fact is clearly deducible from the record that Scott was a mere nominal party to this contract, the appellant being the actual party. Under this contract something like 167½ tons of ore were taken out of the Alta mine and were sent and reduced by the smelting works of appellant. The court found for the plaintiff and appellee for the value of the ore when broken down at the mine—when it first became chattels—estimating the same at $20.00 per ton, thus allowing for the cost of transportation to appellant's smelting works and the cost of reduction, but making no allowance for the labor expended in the mining of the ore—that is, in converting it from realty into chattels. Has the appellant been wronged by this judgment? Did the measure of damages fixed by the court mete to it an injustice? If the evidence in the case supports the 9th and 10th findings of the court or if the evidence conflicts, even though it much preponderates against those findings, the answer to these questions must be in the negative. It is unnecessary to cite a single authority as to the plain and well-defined power and established duty of appellate courts when the evidence is conflicting or tends to support the verdict or finding or is even against the weight of evidence at *nisi prius*. The said 9th and 10th findings of the court below are as follows:

IX.

"That the said entries and trespasses of said Luttrell and Scott upon said Alta mine were each and all with knowledge of plaintiff's ownership thereof."

X.

"The defendant at the time it received said ores had knowledge that they came from said Alta mine and that they were the property of plaintiff."

We think the evidence justified these findings. Luttrell himself testified that he had known the Alta mine since as far back
73 as 1879, and that he knew that Fagan, Harshaw, and others, the grantors of appellee, were the owners of it at that time. He also testified that he knew about the time when the mine was sold to the appellee, and that he knew, as early as 1880, that plaintiff and appellee's grantors had entered the mine in the U. S. land office and had made application for a patent thereto at a cost of some $800.00. Thus he had ample information to put him on his guard lest he invade the rights of other- to impart notice to him, such notice as of itself imputes knowledge. Ignorance of the law is no

e-cuse for its infraction; and, therefore, Luttrell's not knowing that assessment work did not have to be done by the appelle- was no justification for his trespass. The evidence further shows that in Oct., 1883, when Luttrell was in Tombstone to procure medical attention for a physical injury, Salisbury and Scott told him that they had taken steps to prevent a patent to the Alta mine being issued by the Government. Salisbury was the president and chie- owner of appellant, The Benson Mini'g and Smelting Company. His knowledge, therefore, was the knowledge of appellant; and here it is revealed that he had absolute knowledge that the Alta mine had been entered and an application made for a patent, for he had employed a lawyer at Washington and taken steps to prevent the issuance of the patent. Subsequent to the time when appellant took these steps to prevent the issuance of the patent, the bulk of the ore, as shown by the evidence, was taken from the Alta mine and reduced by appellant at its reduction work-. Mr. Salisbury himself testifies: "There had always been some talk about a conflicting claim, because it was a mine located by Luttrell on account of assessment work not being done. That was the reason I investigated the title." If he was not an interested party, why did he investigate the title? If he had no knowledge of the status of affairs, why did he employ a lawyer at Washington and take steps to prevent the issuance of the patent? We think the evidence amply justified the findings, and that appellant was fortunate in having so reasonable a measure meted out to it. It was immaterial, however, whether appellant knew at the time it converted the ore that it belonged to appellee or not. If Luttrell and Luttrell and Scott were guilty of a willful wrong, appellant would be liable to the same rule of damages as would be applicable to them; and this though it bought the ore without any notice or knowledge that it belonged to the Alta Mining and Smelting Co., the appellee. Just compensation is the rule of damage generally applicable in case
74 of trover and conversion, and is the one which the learned judge who tried this case seems to have applied. A more stringent rule would probably have furnishe- the appellant no just cause of complaint. In the celebrated wooden-ware case, decided by the U. S. Supreme Court, in 106 Otto, 432, Mr. Justice Miller, in rendering the opinion of the court, quotes approvingly Lord Hatherly in the House of Lords, in Livingston *vs.* Rawyard Coal Co., 5 App. Cas., 25. In that case Lord Hatherly says: "There is no doubt that if a man furtively and in bad faith robs his neighbor of his property and because it is under ground is probably for some little time not detected, the court of equity in this country will struggle—or, I would rather say, will assert its authority—to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken and making him no allowance in respect to what he has so done, as would have been justly made to him if the parties had been working by agreement." We entertain no doubt whatever that the rule of damages applied by the trial court in this case was eminently just to appellant. See Wooden Ware Co. *vs.* U. S., 106 U. S., 432; Winchester *vs.* Craig, 33 Mich., 205; Greely

vs. Stilson, 27 Mich., 154; Moody *vs.* Whitney, 38 Me., 174; Maye *vs.* Yappan, 23 Cal., 306; Barton Coal Co. *vs.* Cox *et al.*, 39 Md., first page, and the very able review of the case found therein. The learned counsel for appellant relies upon the doctrine of estoppel in this case, and has invoked the wholesome paraphrase that "where one has been silent when conscience required that he should have spoken he shall not be heard to speak when conscience requires that he should be silent." We do not think the doctrine of estoppel should apply in this case. The appellee was not silent when it should have spoken. After Luttrell and Scott had furtively worked the appellee mine a few months it, or rather its grantor, the Government, spoke so loud in the issuance of its patent that appellant suddenly decamped, removing its machinery, etc., in the night, notwithstanding it had employed a counsel at Washington and had taken steps to prevent the issuing of the patent. The doctrine of estoppel *in pais* is closely allied to that old equitable rule that no one shall take advantage of his own wrong. The court below found, and we think rightly so, from the evidence that the possession of Luttrell and Scott was wrongful; that the taking out of ore by them was wrongful, and that the conversion of the ore by appellant was wrongful. Appellant ought not now to be permitted to
75 shield itself behind the doctrine of equitable estoppel *in pais* and have thereby flow to it an advantage from its wrongful and deliberate infraction of its neighbor's rights. Besides, there is no evidence that appellee knew anything about the furtive operations of Luttrell and Scott or the appellant until after those operations had ceased, in December 1883.

But the question upon which the learned counsel insists with greatest stress is that Luttrell had the right to relocate the mine on January 1st, 1883, because the assessment work had not been done in 1882; that notwithstanding appellee's grantors had made regularly entry of an application for a patent to the mine the assessment work had to be done until the patent issued. This position, although maintained with all the force of ingenious and subtle reasoning, is, we think, untenable. The law has been s-ttled the other way. When the entry was made and the certificate of purchase was given the land covering this mine became segregated from the mass of public lands and was thenceforth private property, the contract of purchase being complete when the certificate of entry was executed and delivered. The Government subsequently to this time held the naked legal fee, until the patent was actually issued, in trust for the purchaser, who had by that entry and certificate become the equitable owner, and the land thereafter ceased to be a part of the public domain. The property thus acquired thereafter became subject to territorial taxation. The ownership of the property was changed as soon as the entry was made according to the term and in the manner prescribed by law. The patent when issued by operation of law related back to the date of the original entry.

Now, the logic of the learned counsel for appellant, to be consistant, must be that the effect of a failure to do the assessment work

on a mine to the owner of which no patent has yet issued, although entry has been made and certificate given, is to throw such mineral land back into the public domain, or, rather, perhaps, that it has never become segregated from that domain, and that therefore if the assessment work has not been done in any year up to the issuing of the patent the mine becomes subject to relocation. Counsel admits that in regard to agricultural lands the party making entry and getting the certificate becomes the equitable owner of such entry, the Government being a mere naked trustee of the legal title, but contend that as to the mineral lands it is different; that the great purpose of the Government
76 and of the legislation of Congress has been to develop the mineral resources of the country. This is true, but has not one of the great purposes of the Government and of the legislation of Congress been to develop the agricultural resources of the country also? And is there any good reason why the same rule of law should not govern and the same principles apply in the conveyance by the Government of the one class of lands that govern and apply in its conveyance of the other? True, different regulations as to the purchase price per acre, number of acres, &c., have been made as to the two classes of land. Some of the preliminary steps entitling one to make entry in the one class are different from those entitling him to make entry in the other, but when legal entry has been made and a certificate of purchase issued he should in either class, is not the equitable title which follows in the one as absolute as that which follows in the other? Why should it not be? There is no difference. The Supreme Court of the United States in repeated decisions has put the matter beyond cavil. In Deffeback *vs.* Hawke, 115 U. S., 405, Mr. Justice Field, in delivering the opinion of the court, said: "On the 20th day of November, 1877, the plaintiff applied to the United States land office at Deadwood to enter the land as a placer mining claim, and on the 31st of January, 1878, entered it as such by paying the Government price therefor. No adverse claim was ever filed with the register and receiver of the local land office and the entry was never canceled nor disapproved by the officers of the Land Depart- at Washington. The right of the Government, therefore, passed to him, and, though its deed—that is, its patent—was not issued to him until January 31st, 1882, the certificate of purchase which was given to him upon the entry was, so far as the a-qui-tion of title by any other party was concerned, equivalent to a patent." It must be borne in mind that this case, like the one at bar, involved the title to mineral land.

Now, it will not be pretended that, if the Alta Mining and Smelting Company had had a patent instead of a certificate of purchase at the date of said certificate, no assessment work would have been necessary. If it be true that upon making the entry and obtaining a certificate of purchase and equitable title accrued to plaintiff and the land entered became the private property of the plaintiff and ceased to be a part of the public domain, why was there any great necessity that assessment work should be done in the one case
77 than in the other? The plaintiff had bought and paid for

that much mineral land and had obtained the Government's certificate of purchase. The purpose of the Government as to that part of the public domain was thereby fully subserved. It became a matter immaterial to the Government whether assessment work was done or not; as much so as to whether a farmer, who had acquired equitable title to agricultural lands by entry and certificate of purchase, should put his fields in barley or rye or should not cultivate them at all.

Pending the entry no adverse claim was filed in the local land office of Pima county, nor was the entry ever canceled or set aside in the Land Department at Washington. The Alta mine was not then subject to relocation on Jan. 1st, 1883, when J. M. Luttrell attempted to relocate it and took possession thereof. It had ceased to be a part of the public domain. This Luttrell knew, or should have known; he was a mere trespasser without even color of title, for, as the Supreme Court of the United States says in Deffeback *vs.* Hawke, see *supra*, "There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right of possession; and there can be no such thing as good faith in an adverse holding where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation." Brave words these, but plump with the flesh of truth. This is the deliberate adjudication of our great tribunal of final resort. From this central judicial oracle comes those decrees which constitute the highest law of the land. Luttrell is presumed to have known the law. He is presumed to have known that appellee's grantors had entered the Alta mine in the U. S. land office, had payed the purchase-money for the same, and had gotten a certificate from the Government to that effect; that under the law on Jan. 1st, 1883, when he attempted to relocate the mine, no assessment work had to be done upon it, for it had ceased to be a part of the public domain, and therefore was not subject to relocation, and that under the law "there can be no such thing as an adverse holding where the party knows he has no title," and no such thing as good faith in such holding. Certainly if the mine was not subject to location he could gain no title by attempting to locate it. All this Scott and the appellant through Salisbury, it- president and manager, knew, or should have known, are presumed to have known, and must be held responsible for not knowing. See Deffeback *vs.* Hawke, 115 U. S., 392; Witherspoon *vs.* Duncan, 4th Wall., 210; Carroll *vs.* Safford, 3 Howard, 441; Courchaine *vs.* The Bullion Mining Co., 4 Nev., 369; Kahn *vs.* Old Telegraph Co., 2 Utah, 174; Stark *vs.* Storr, 6 Wall., 418.

78 & 79

We are inclined to the belief that this was a willful, deliberate, and intelligent trespass. At all events, we are certain no injustice has been done to appellant. The judgment is therefore affirmed.

JAMES H. WRIGHT, *C. J.*
WM. H. BARNES, *A. J.*

Indorsed: In the supreme court of the Territory of Arizona, Jan-

uary term, 1887. Submitted at the adjourned term in April, 1887. The Alta Mining and Smelting Co. *vs.* The Benson Mining and Smelting Co. Opinion by Wright, C. J. Filed February 17th, 1888. E. B. Dodge, clerk.

80 *Judgment.*

In the Supreme Court of the Territory of Arizona.

THE ALTA MINING & SMELTING CO., Pl'ff & Resp't,
vs.
THE BENSON MINI-G & SMELTING CO., Def't & App.

Appeal from Pima county.

This cause having been argued and submitted, and the court having had the same under advisement and consideration, and the court being fully advised in the premises—

It is by the court ordered and adjudged that the judgment of the court below appealed from be, and the same is hereby, affirmed.

Judgment entered February 17th, 1888.

Attest: E. B. DEDGE, *Clerk.*

Opinion by James H. Wright, chief justice, Hon. Wm. H. Barnes, associate justice, concurring.

81 In the Supreme Court of the Territory of Arizona.

THE ALTA MINING COMPANY, Respondent,
vs.
THE BENSON MINING AND SMELTING COMPANY, Appellant.

Know all men by these presents that we, The Benson Mining and Smelting Company, a corporation organized and existing under the laws of the State of California and doing business in the said Territory of Arizona, and H. A. Rogers and E. F. Rogers, are held and firmly bound unto The Alta Mining Company, the respondent or appellee herein, in the full and just sum of six thousand dollars, to be paid to the said appellee herein, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, o-r heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a session of the supreme court of the said Territory of Arizona, in a suit depending in said court between the said Alta Mining Company, the appellee herein, and the said Benson Mining and Smelting Company, appellant herein, a final judgment was rendered against the said Benson Mining and Smeltin- Company, appellant, and the said Benson Mining and Smelting Company having obtained the allowance of an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said judg-

ment in the aforesaid suit, and notice thereof having been given to the said appellee and its attorneys, in open court, at the time of the rendition of said judgment, admonishing it and them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next, which said notice in open court was entered upon the minutes of the said supreme court of said Territory of Arizona:

Now, the condition of the above obligation is such that if the said Benson Mining and Smelting Company shall prosecute said
82 appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

E. F. ROGERS. [SEAL.]
H. A. ROGERS. [SEAL.]

Sealed and delivered in presence of—
C. A. STORKE.

Approved by—
WM. H. BARNES,
Asso. Justice,

By order of the territorial supreme court of the said Territory of Arizona authorizing him so to do.

Indorsed: In the supreme court of the Territory of Arizona. The Alta Mining Company, respondent, *vs.* The Benson Mining & Smelting Co., appellant. Bond on appeal. Filed April 24th, 188–. William William Wilkerson, clerk, by J. H. Martin, deputy.

83 *Assignment of Errors.*

1st. The supreme court erred in holding that the title of the Alta Mining Co. was not forfeited and lost by a failure to perform the annual assessment work required by the mining act of Congress dated May 10th, 1872, in each year after entry and until patent issued.

2nd. The court erred in holding that the rule of damages in this case should be fixed upon the value of the ore on the dump after it had been mined and brought to the surface by defendants and appellants, thus allowing nothing for the cost of extracting and hoisting to the surface.

3rd. The court erred in holding that the entry of the defendants upon the mining claim and the relocation thereof was willful and with full knowledge of plaintiff's superior rights.

GEO. G. BERRY,
Attorney for Appellant.

Indorsed: In the supreme court of the Territory of Arizona. The Alta Mining and Smelting Company, appellee, *vs.* Benson Mining and Smelting Company, appellant. Filed March 8th, 1889. William Wilkerson, clerk.

84 In the Supreme Court of the Territory of Arizona.

THE ALTA MINING AND SMELTING COMPANY, Plaintiff and Appellee,
vs.
THE BENSON MINING AND SMELTING COMPANY, Defendant and Appellant.

TERRITORY OF ARIZONA, *County of Cochise,* } *ss:*

Geo. G. Berry, one of the defendant's attorneys in the above-entitled action, being first duly sworn, says upon oath that he is well acquainted with all the facts in said case, and that in addition to the amount recovered against the defendant, which is a little less than $5,000, excluding costs, *that* the titles to the mines incidentally involved in the action, the value of which will increase the sum or property value involved to a greater sum than five thousand dollars.

GEO. G. BERRY.

Subscribed and sworn to before me this 4th day of March, 1889.

JNO. C. EASTON,
Justice of the Peace.

Indorsed: In the supreme court of the Territory of Arizona. The Alta Mining and Smelting Company, appellee, *vs.* Benson Mining and Smelting Company, appellant. Affidavit of value. Filed March 8th, 1889, at 10 o'clock a. m. William Wilkerson, clerk.

85 In the Supreme Court of the Territory of Arizona.

THE ALTA MINING & SMELTING CO., Plaintiff and Appellee,
vs.
THE BENSON MINING AND SMELTING CO., Defendant and Appellant.

The above-entitled action having been heretofore heard and decided in favor of the appellee, and the appellant having taken an appeal from said decision to the Supreme Court of the United States, this court makes and certifies to said Supreme Court a statement of the facts appearing in the records of said case in our said court:

Statement of Facts.

I.

That both the plaintiff and defendant are corporations duly authorized to transact business under the laws of this Territory.

II.

That this action was tried in the court below without a jury, and

the record which comes to this court shows the following facts, to wit:

That in the year 1879 Fagan, Harshaw, and others were the owners of the Alta mine, in the Harshaw district, and at about that time made application to the proper land office for a United States patent thereto, and on payment of the price required by law and during said year obtained a certificate of purchase therefor, and soon afterwards sold and conveyed the same to The Alta Company, the plaintiff and appellee herein.

III.

That plaintiff continued to do a large amount of work upon the claim up to the year 1882, and, having failed in that year to do as much as $100.00 worth of work on said mine, one J. K. Luttrell relocated the mine and called it the Ben. Butler mining claim about June 1st, 1883, and soon thereafter commenced work upon the same.

86 IV.

In the summer of 1883 said Luttrell entered into a contract with H. H. Scott, who was acting for and in the interest of the defendant & appellant, to furnish machinery and supplies for the active working and development of the mine on the condition that the ore was to be sent to defendant's smelter, at Benson, for reduction.

V.

That the defendant and appellant had knowledge of the fact that Luttrell had relocated the mine.

VI.

The record before us fails to show that any exceptions were taken to the admission of evidence on the trial of said case.

VII.

The court in addition finds the facts as they are more fully stated in the opinion of this court in this case on file (16 Pac. Reporter, p. 565).

WM. H. BARNES, *A. J.*
JAMES H. WRIGHT, *C. J.*

Indorsed: No. 189. In the supreme court of the Territory of Arizona. The Alta Mining & Smelting Co., pl'ff & appellee, *vs.* The Benson Mining & Smelting Co., def't & appellant. Statement of facts. Filed January 18th, A. D. 1889, at 4 o'clock p. m. William Wilkerson, clerk.

87 SUPREME COURT, *Territory of Arizona,* } *ss:*

I, William Wilkerson, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full

and complete copy of the transcript on appeal to said supreme court and exemplifications of the record and proceedings of the court in the action lately pending in said supreme court, wherein Alta Mining and Smelting Company was appellee and The Benson Mining and Smelting Company was appellant, and of the whole of said record and proceedings as the same appears on file and of record in my office.

Seal United States Supreme Court, Arizona.

In witness whereof I have hereunto set my official hand and affixed the seal of said court on this the 13th day of March, A. D. 1889.

WILLIAM WILKERSON, *Clerk.*

Endorsed on cover: Case No. 13,530. Arizona Territory supreme court. No. 347. The Benson Mining and Smelting Company, appellant, *vs.* The Alta Mining and Smelting Company. Filed April 3, 1889.

Office Supreme Court U. S.
FILED.
APR 22 1892
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 347.

The Benson Mining and Smelting Company, Appellant,

v.

The Alta Mining and Smelting Company.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLANT.

NATH'L WILSON,
of Counsel for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 347.

THE BENSON MINING AND SMELTING COMPANY, APPELLANT,

v.

THE ALTA MINING AND SMELTING COMPANY.

Brief for Appellant.

STATEMENT.

This is an action brought by appellee in the District Court of Pima County, Arizona, to recover damages for alleged wrongful conversion by appellant of some 210 tons of ore taken from the Alta mine, situate in Cochise County, Arizona, between June 1 and December 1, 1883, and alleged to be the property of appellee (Amended Complaint, Rec. 3).

The answer denied the ownership of appellee in said

mine; averred lawful location of the premises by one Luttrell, under the United States mining laws; his exclusive possession thereof for over six months prior to August 28, 1883, when he sold an interest therein to one Scott, and that during such time and until a period in 1884 the ore extracted by them therefrom did not exceed 176 tons, whereof only 18.81 tons were delivered by them during said time to appellant for reduction, and that the proceeds therefrom did not equal the cost of extracting said ore, the transportation thereof to appellant's smelter, and the cost and charges of reducing the same, "and that said ore, before its excavation from the mine "and transfer to defendant's smelting works, was of no "value whatever" (Rec. 4, 5).

The case was tried by the Court (jury being waived) (Rec. 5).

The evidence appears at large in the Record (pp. 7–35), and the findings thereon at pp. 36 and 37.

Therefrom the Court found that Luttrell and Scott had at stated times from June to December, 1883, taken from said mine some 186 tons of ore, valued at $11,716.65; delivered same to appellant, who took the ore with knowledge that same came from the Alta mine and was the property of appellee; that the cost of removing and separating said ore by Luttrell and Scott and of transporting same to appellant's smelter was $7,985.83, and thereupon entered judgment for the difference between these amounts, with added interest, in the sum of $4,590.06, with added costs and certain statutory allowances (Rec. 5).

An appeal was taken to the Supreme Court of the Territory, where the judgment was affirmed (Rec. 48) for reasons given in the opinion of that Court (Rec. 42–47).

Thereupon an appeal was prayed and allowed to this Court (Rec. 41).

ASSIGNMENT OF ERRORS.

The errors assigned in this Court appear at p. 49 of the Record, thus:

"1st. The Supreme Court erred in holding that the title "of the Alta Mining Co. was not forfeited and lost by a "failure to perform the annual assessment work required "by the Mining Act of Congress dated May 10, 1872, in "each year after entry and until patent issued.

"2d. The Court erred in holding that the rule of dam- "ages in this case should be fixed upon the value of the "ore on the dump after it had been mined and brought "to the surface by defendants and appellants, thus allow- "ing nothing for the cost of extracting and hoisting to "the surface.

"3d. The Court erred in holding that the entry of the "defendants upon the mining claim and the relocation "thereof was wilful and with full knowledge of plaintiff's "superior rights."

ARGUMENT.

I.

The statement of facts made by the Supreme Court of the Territory (Rec. 50, 51) disclose the following as material to discussion of the first assignment of error:

"That in the year 1879 Fagan, Harshaw, and others "were the owners of the Alta mine, in the Harshaw dis- "trict, and at about that time made application to the "proper land office for a United States patent thereto, "and on payment of the price required by law and during "said year obtained a certificate of purchase therefor, "and soon afterwards sold and conveyed the same to The "Alta Company, the plaintiff and appellee herein.

"That plaintiff continued to do a large amount of work "upon the claim up to the year 1882, and, having failed "in that year to do as much as $100.00 worth of work on "said mine, one J. K. Luttrell relocated the mine and "called it the Ben. Butler Mining Claim about June 1, "1883, and soon thereafter commenced work upon the "same."

Patent issued upon the entry of Fagan *et al.* on January 10, 1884 (Rec. 12).

The Court below held:

"When the entry was made and the certificate of pur-"chase was given, the land covering this mine became "segregated from the mass of public lands, and was "thenceforth private property, the contract of purchase "being complete when the certificate of entry was exe-"cuted and delivered" (Op., Rec. 45).

The basis for this conclusion is therein vested upon assumed analogous decisions of this Court, wherefrom the deduction is sought to be made that *all* conditions imposed by law in the acquisition of title to mining lands cease from date of issue of certificate of entry, which is in legal effect the full equivalent of patent with respect thereto.

It is submitted that such is *not* the law, nor the just deduction to be derived from any decision yet rendered by this Court.

The United States mining laws (Sec. 2324 R. S., Chap. 6) provide:

"On each claim located after the 10th day of May, "1872, *and until a patent has issued therefor*, not less than "one hundred dollars' worth of labor shall be performed "or improvements made *during each year*," * * * "and upon a failure to comply with these conditions, the "claim or mine upon which such failure occurred shall be "open to relocation in the same manner as if no location

" of the same had ever been made, provided that the origi-
" nal locators, their heirs, assigns, or legal representatives,
" have not resumed work upon the claim after failure and
" before such location."

The language of the statute is thus plain and unambiguous. The requirement of annual work and expenditure is an express condition, " and until a patent has issued therefor." No resort to construction is necessary, and hence is not permissible. To adopt some *other* date, or limit the stated condition to the time of *entry*, is simply to import a construction *into* the statute against all recognized canons of interpretation. The language used plainly disclosed a condition certain in expression and perfectly clear to the common understanding of men. The mining law was passed for the benefit and the use of *miners*; the terms employed therein were to be read and acted upon by men of ordinary understanding, engaged in a pursuit wherein neither by necessity nor by education was a condition plainly expressed intended to convey a subtle or hidden meaning *beyond* the language thus used and wholly repugnant to its plain expression and sense. The word " patent " carried a meaning well understood by all; its only meaning was and is the instrument of *conveyance* from the Government of a portion of its public domain. That is indisputable. In such view, what is the rule by which the reading of the statute is governed? It is plainly given by Mr. Sutherland in his work on *Statutory Construction* (Sec. 251) thus:

" Words in common use and not technically employed
" in a statute which is intended to be understood and
" practiced upon by the people should be construed ac-
" cording to their popular meaning; that such was the

" intention of the Legislature is the only intendment that " ought to be adopted," citing

Strong v. *Birchard*, 5 *Conn.* 357, 361.
Avery v. *Pixley*, 4 *Mass.* 460.
Robinson v. *Varnell*, 16 *Texas*, 382.

And they are so read in accordance with this just rule by the Circuit Court in *Silver Mining Co.* v. *Brown* (10 Saw., 243, 245), wherein the Court declares:

" A claimant of mining ground, *until he has secured* " *patent therefor*, must be an actor, and must annually " perform the work required thereon, and in establishing " title thereto must show compliance with the law in this " respect."

So also in *Jackson* v. *Roby*, October Term, 1883 (109 *U. S.* 440, 442), this Court recites this condition of the mining law as continuing and applicable to a mining claim " *until a patent for it is issued*," without suggestion of any hidden meaning therein changing the condition thus expressed to date of *entry* or otherwise than as plainly stated by the statute.

In the absence of express *judicial* authority from this Court or elsewhere declaring the statute to mean otherwise than its plain language imports, it is submitted that Luttrell, the relocator of the premises, properly acted upon the rule cited *supra*; gave to the statute its "popular " meaning," and finding the former claimants had failed to perform the prescribed annual labor until a patent had issued upon the claim, exercised the right of relocation given thereby in manifest good faith.

It is true the Land Department has heretofore ruled in accordance with the views expressed by the Court below,

but if its interpretation of the law is clearly erroneous, this Court will be neither guided nor controlled thereby.

St. Paul, &c., Ry. Co. v. *Phelps*, 137 *U. S.* 528, 536.

The leading decision of the Land Department thereon (*American Hill Quartz Mine, Copp's U. S. Mineral Lands*, p. 254; *Sickel's Mining Laws and Decisions*, p. 377) cites in its support sundry decisions of this Court upon the effect of an entry of agricultural lands. Conceding in the fullest degree that in *such* cases, on payment and entry, the equitable title passes to the entryman and the *right* to patent thereon accrues, the cases cited will not be found to stand upon laws wherein the *express* condition here involved is present. In the cases cited, *all* conditions precedent of settlement, &c., run only to date of payment and entry. The express limitation in this line of authorities is the assumption of prior and full compliance with such conditions imposed by the statute as running only to time of entry and payment. The subsequent subjection of the land to taxation or alienation is but the application of common, well-understood principles, whereby the beneficial owner is treated in law as the *actual* holder of the legal title. Yet, under all such laws and in daily administration of the Land Department, the power to cancel an entry on proven failure to comply with law—non-subjection of the land to such entry for any reason reaching to the question of *jurisdiction* over the subject-matter, and consequent want of power of disposal thereof—has been constantly exercised since the earliest days, and its existence has been sanctioned by this Court.

Barnard's Heirs v. *Ashley's Heirs*, 18 *How.* 43.

Harkness v. *Underhill*, 1 *Black*, 316, 325.

Lee v. *Johnson*, 116 *U. S.* 48–52.

And such power of supervision and cancellation of mineral entries is expressly recognized by Sec. 2325 R. S., where publication of mineral application for patent without objection or adverse claim is made conclusive in favor of the applicant's right, "except it be shown that the ap- "plicant has failed to comply with the terms of this "chapter."

Nor does the contention here made stand in opposition to the line of decisions of this Court, illustrated by the case of *Myers* v. *Croft* (13 *Wall.* 291), wherein it was held that the prohibition against assignment of the right of pre-emption prior to issue of patent must be construed to mean as running only to the time of payment and entry. The conclusion there expressed is governed by the salutary rule of law which looks with disfavor upon all restraints upon the power of alienation. The pre-emption law imposes conditions of settlement, cultivation, &c., *antecedent* to the exercise of the right to make proof thereof, payment, and entry. All affirmative acts of the settler connected with the *land* run to the time of such entry and payment. No further residence, cultivation, or connection with the premises is imposed as a condition to the right to patent. But under the mining law the requirement of annual expenditure in developing the claim, until patent has issued thereon, is plainly declared, and as certainly meant. The assumed analogy between the mining statute, with its requirement of express affirmative acts upon the claim until issue of patent, and the prescribed conditions under the settlement laws antecedent to entry only, is, therefore, without force.

Moreover, the repeated decisions of this Court upon the effect of entry and payment with respect to agricultural lands were well known to Congress when the mining act of May 10, 1872, containing the provisions of the present

Section 2324, R. S., was enacted. Had Congress intended this requirement of annual labor and development of a mining claim to cease upon *entry* of the land, it could and should have used proper language to express that intention. It did not do so. *Per contra*, and with such full knowledge of the law as declared by this Court, it made the condition in question, and by plainest language continues it down to the time of patent. The motive for this plain distinction can be readily understood.

In the sale of its agricultural domain the Government received approximate full value therefor. But the primary object of the mining law was to aid and stimulate production of the precious metals. The price fixed for the surface acreage of a mining claim ($5 per acre) bore the most insignificant relation to the underlying mineral wealth. The statute was designed simply to afford a method whereby the miner could acquire the Government title by a simple proceeding. The entire purchase price for a claim of maximum area—1,500 x 600 feet, or twenty acres—would be but $100, while proof of $500 expenditure in permanent mining improvements upon the claim is one of the conditions precedent to the right to patent.

The entire object of the law being solely to encourage development of the mineral resources of the Nation, the Government in effect gives its title without receiving therefor more than what probably covers the cost of conveyancing.

Hence, the requirement of annual expenditure and development until actual issue of patent, stands in harmony with the entire policy of the mining statutes. As the United States controls the title until patent issues, the requirement of continued annual expenditure embracing the year wherein it may be issued is neither a hardship nor in opposition

to the plain object and policy of the law. In the sale of coal lands—the cheapest mineral—from $10 to $20 per acre is exacted as the purchase price. In thus fixing so much higher price therefor than for land containing the precious metals, the law imposes on the purchaser of coal lands no requirement of continued development until issue of patent, thus emphasizing the force of the contention here made.

Stress is laid by the Court below upon the decision in *Deffeback* v. *Hawke* (115 *U. S.*, 405), wherein it was held that on payment and entry under the mining law the right of the Government passed to the mineral claimant, and "the entry was, so far as the acquisition of title by any "other party was concerned, equivalent to a patent." But the adverse title was there asserted under the town-site law, which the same decision holds forbids entry thereunder of valuable mineral lands. The Court in the case cited simply held that after mineral entry the attempt to assert adverse title under the town-site law was ineffectual. That case does not, however, in principle or effect, militate in any degree against the contention here made, where the adverse right is asserted under the mining laws and in aid of the development of the precious minerals—the great and paramount object of the laws.

II.

The ruling of the court below that the entry of Luttrell, the relocator, was wilful, and denying the right of appellant to an allowance for the cost of extracting and hoisting the ore to the surface, was equally erroneous. Its assumed basis is that Luttrell *knew* he was acting without legal right. But such assumption is unwarranted. The findings show that the mine was abandoned; the

object of the law—development and extraction of the precious metals—was defeated. By mere payment of a few dollars to the United States as the insignificant purchase price for the surface area of the claim, the former claimants neither sought to effectuate the purpose and policy of the law nor to permit others to have opportunity so to do. No decision of this or any other Court had declared that the plain language of Sec. 2324, R. S., imposing the requirement of annual development "until a patent has "issued therefor," and providing a forfeiture and right of relocation for failure so to do, meant something else, or substituted by construction some other act and some other date than the act and time of the issue of patent. The relocater, Luttrell, could, under such circumstances, assume with equal propriety that the premises were open to his location, as could the former claimants that by mere entry they had secured the privilege of thereafter defeating the object of the law under which their entry was permitted. He sought only to do what the plain reading of the law gave him the right to do, and by extracting the ore carry out the great paramount object the law intended, *i. e.*, development and extraction of the mineral then lying hidden and without value to the Nation. For doing what the law designed and was aimed to accomplish, the Court below finds him a trespasser against those who had abandoned possession, ceased development, and stood upon a mere certificate of entry to justify *their* failure to do what the law was clearly designed to accomplish.

It is respectfully submitted that the judgment below should be reversed.

NATH'L WILSON,
of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
APR 4 1892
JAMES H. McKENNEY,
CLERK.

RECORD, CASE NO. 13,530.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 347.

THE BENSON MINING AND SMELTING COMPANY,
APPELLANT,

vs.

THE ALTA MINING AND SMELTING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF

OF

J. A. ANDERSON,
Attorney for Appellee.

RECORD, CASE NO. 13,530.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 347.

THE BENSON MINING AND SMELTING COMPANY, APPELLANT,

vs.

THE ALTA MINING AND SMELTING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF

OF

J. A. ANDERSON,

Attorney for Appellee.

This brief is prepared without seeing the brief of appellant.

The "statement of the facts of the case" consists of certain paragraphs specifically found, and "in addition" "the facts as they are more fully stated in the opinion" of the Supreme Court of Arizona, found in transcript on pages 42 to 47 inclusive. [See transcript page 51.]

The facts that have reference to the assignment of errors, as gathered from the "statement of the facts of the case" briefly stated, are as follows:

The Alta mine in Harshow district, ~~Pierce~~ Pima county, Arizona, was owned by Fagon, Harshow and others, prior and up to September 1879.

About that time they applied for patent for the same and made payment and received certificate of entry therefor, and then sold and conveyed the mine to appellee, and in the usual course of the administration of affairs at the land office in Washington a patent was issued in January 1884.

After the purchase the appellee took possession of the mine and worked it extensively up to 1882. In that year appellee did but little work upon the mine, less than $100 worth. On the pretense that the assessment work was not done for 1882, one J. M. Luttrell on the first of January, 1883, attempted a relocation of the mine under the name of the Ben Butler.

Luttrell entered upon the mine, and made a contract, nominally with one Scott but in reality with appellant, to extract the ores from the mine and have them reduced at the appellant's reduction works at Benson.

The machinery and labor by which the ores were extracted from the mine were furnished by appellant. Lutterell, Scott and appellant were aware that the mine had been entered, and appellant tried to prevent the issuance of patent to appellee in Washington. The court below and the Arizona Supreme Court found that the entries of Luttrell and Scott (the agent of appellant,) upon the mine were each and all with knowledge of the appellee's ownership thereof and were wilful trespasses. And that appellant at the time it received the ores had knowledge that they came from the Alta mine and that they were the property of plaintiff.

The court found that the ores when broken down in the mine—when they first became chattels—were worth $20.00 per ton, and gave judgment in favor of appellee against appellant for the said value—without allowing for the labor expended in mining the ores—that is in converting it from realty to chattels.

The appellant was allowed the costs of transportation to the reduction works of appellant and for the reduction of the ores to bullion.

The first assignment of error is as follows:

1st. The Supreme Court erred in holding that the title of the Alta Mining Co. was not forfeited and lost by a failure to perform the annual assessment work required by the mining act of Congress dated May 10th, 1872, in each year after entry and until patent issued.

The question raised by this assignment, to wit:

Is it necessary to do assessment work on a mine after issuance of certificate of entry? has been uniformily decided in the negative by the rulings of the land department and

by the decisions of the courts—including the decision of this court in Deffenback *v.* Hawks, 115 U. S. 405. See ruling of the Secretary of Interior rendered March 4th, 1879, found in Sickles Mining Decisions, pages 377 *et seq.*

See also Aurora Hill Con. Mining Co. *v.* 85 Mining Co. 35 Federal reporter 515, and Deno *v.* Griffin, 20 Pacific reporter 308.

The second assignment of error is as follows:

2nd. The court erred in holding that the rule of damages in this case should be fixed upon the value of the ore on the dump after it had been mined and brought to the surface by defendants and appellants, thus allowing nothing for the cost of extracting and hoisting to the surface.

Upon the point involved in this assignment we call the courts attention to the case of Wooden Ware Co. *v.* U. S. 106, U. S. reports 432, cited in transcript on page 44.

We refer to the following additional authorities directly in point:

The leading case in California on the measure of damage is Maye *v.* Yappan, 23 Cal., 306 (found in 10 Mining Reports, 101.)

In that case the court held:

"If a party, in ignorance of his boundary line, enters upon an adjoining mining claim, and take away gold-bearing earth therefrom, the measure of damages, in an action for trespass upon the land, is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel."

It is also held in that case, that "Defendants who have the means of ascertaining the exact boundaries of their mining claim, and work across such boundaries, in *ignorance* of their location are *guilty* of NEGLIGENCE."

The case of the Barton Coal Co. *v.* Cox et al., 39 Maryland R ., p. 1 (also found in 17 American reports, 525, and in 10 Mining reports, 157), is a very ably considered case—and all the authorities are reviewed.

It is held in that case, that—

"In trespass for coal mined and taken, the proper estimate of damages is its value, after it is severed and before removal, and without deducting the expenses of severance. If the defendants *knew* that the land was not *their own*, *exemplary* damages are allowed."

In the above case, the above stated rule was held applicable, notwithstanding the court found that the defendant was not a wilful trespasser, "but dug the coal without knowing that it was trespassing upon the property of the plaintiff, but believing it was its own coal."

The same rule is applied in Franklin Coal Co. *v.* McMillan, 49 Maryland, p. 549 (found also in 10 Mining Reports, page 224).

In that case the court says:

"Trespass upon the land of another, if not wilful, always imply some degree of negligence. In this case the defendant's *excuse* is that it *claimed* to be the *owner* of the land But it has been shown by the *proof* and by the *verdict* that its claim was not well founded, as it is said in Maye *v.* Yappan, 23 Cal., "When a party has the means of ascertaining the dividing line he is guilty of negligence in not ascertaining its location."

I call the court's attention to two able Illinois decisions —91 Ill,, page 561, and 92 Ill., page 353 (both found in 10 Mining Reports—the first on 277, the other at page 282.) The latter of these two cases was where the act was knowingly and wilfully done, just as in our case—and the court held that the jury in such case was justified in giving *punitive* damages. I would especially call the attention of the court to the reasoning of said decision.

The case of Walter *v.* Stevevson, 13 Nevada, 157 (found in Mining Reports, vol. 10, page 240), (the case especially relied upon by counsel below), was one in which the trespass consisted in an *unintentional* working across the defendant's boundaries and in that case it is decided that:

"A trespasser taking ore, in the *absence* of *fraud* or *culpable negligence* by overstepping boundaries, is entitled to deduction of the costs of mining the ore in question,"

Showing, that even that case holds that, where there is fraud or negligence, no deduction should be made for digging the ores.

The third and last assignment of error is as follows:

3rd. The court erred in holding that the entry of the defendants upon the mining claim and the relocation thereof was wilful and with full knowledge of plaintiff's superior rights.

The matter of this assignment was a question of fact and was so found by the district judge—trying the case without a jury—and was so found by the Supreme Court of Arizona. The facts so found are not open to review, in this court, in an action at law.

Jessup *v.* United States, 106 U. S. 147.
Nows *v.* Jackson, 9 Wall 125.
Ryan *v.* Cortes, 93 U. S. 78.
Walnut *v.* Wade, 103 U. S. 683.

Respectfully submitted.

J. A. ANDERSON,
Attorney for Appellee.